American Bar Association Journal

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In This Issue

Eugene C. Gerhart Describes the "Compleat Counsellor"

With a bow to Sir Izaac Walton, Mr. Gerhart borrows his title to describe the kind of lawyer that represents the highest ideals of members of the profession. Discussing frankly the faults of the Bar, Mr. Gerhart believes that lawyers must again become the leaders and molders of opinion that they were in what he calls the "Golden Age of the American Bar". He believes that the profession can again produce the Websters, the Choates, the Roots, and the Darrows who made the legal profession second to none in leadership and honor among their fellow citizens. (Page 975.)

Edwin M. Sears Describes Goethe's Legal Career

Johann Wolfgang von Goethe, the great poet born two hundred years ago in Germany, found time during his prolific years of writing to earn his degree in law at Strasbourg and to practice at the German Bar. Although his career as a lawyer was soon obscured by his literary activities, Goethe proved to be an earnest advocate of legal reform and a critic of the rigidity of the *usus modernus pandectarum*, the system of law practiced in Germany in the eighteenth century. Lawyers who have read *Faust* will not be surprised that its author understood the law and legal philosophy. Mr. Sears' article is an interesting sketch of Goethe as a lawyer. (Page 985.)

Ben W. Palmer Describes Vestigial Remnants of Law

Perhaps only Mr. Palmer's facile imagination would find a resemblance between a stout Irish bailiff in one of our trial courts and the vermiform appendix that causes us so much trouble, or between the court marshal and the pineal gland in the human brain, but the resemblance is there, and Mr. Palmer explains it in this essay, which is the first of a series of four. He traces the origins and functions of the offices of bailiff, constable and marshal, and describes their fall from the council chambers of kings and princes to lowly seats in the drab, dimly-lighted rooms that are still found in many of our local courts. (Page 981.)

Theodore R. Iserman Questions Use of Arbitration

When the editors of the JOURNAL requested Mr. Iserman to review Shulman and Chamberlain's new *Cases on Labor Relations*, he replied that the book raised questions about labor arbitration that required more extended discussion than the usual book review. Accordingly, he has written a short article on the subject, using the book as his documentation. In a day when it is not infrequent to hear demands for compulsory arbitration as a means for "solving" all our labor law problems, Mr. Iserman's essay has a sobering effect. If, as Mr. Iserman assumes, the primary purpose of industrial enterprise is efficient production, some of the decisions of arbitrators reported in this new casebook are open to serious criticism. This is an article all citizens should read. (Page 987.)

A Suggestion for Combining Experience with Legal Education

The problem of acquiring experience in handling practical legal problems is one that every lawyer faces at the start of his career. The law schools can teach legal theory and the use of legal technique, but they can do little to help the neophyte lawyer who suddenly realizes, despite three or four years of legal education, that he does not know what to do about his first case. Bertram S. Silver proposes in this article that part of a law student's education should be a period of apprenticeship in a law office *during* his student days, before he is admitted to the Bar. (Page 991.)

Derrick Bass Describes the English Bar

Advocates and attorneys have distinctly separate professions in the United Kingdom. In this article, Derrick Bass describes the duties and privileges of barristers and solicitors. The barristers are superior both in rank and dignity to the solicitors. Their sole duties are "pleading" at the Bar and advising solicitors on difficult matters of conveyancing or drafting. The solicitor actually handles his clients' legal problems, consulting a barrister on difficult questions, and when it is necessary to bring a case into court. Only solicitors are allowed to draft conveyances. Lawyers will be interested in comparing the organization of the English Bar with that established in the United States. (Page 995.)

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1. The names and addresses of the publisher, editor, managing editor, and business managers are:

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Editor, Tappan Gregory, 105 S. LaSalle St., Chicago 3, Ill.

Managing editor, There is none.

Business manager, There is none.

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5. The average number of copies of each issue of this publication sold or distributed, through the mails or otherwise, to paid subscribers during the twelve months preceding the date shown above was:

(This information is required from daily, weekly, semiweekly, and triweekly newspapers only.)

Tappan Gregory

Sworn to and subscribed before me this 20th day of October, 1949.

(seal) Eleanor Mueller

(My commission expires November 21, 1951)
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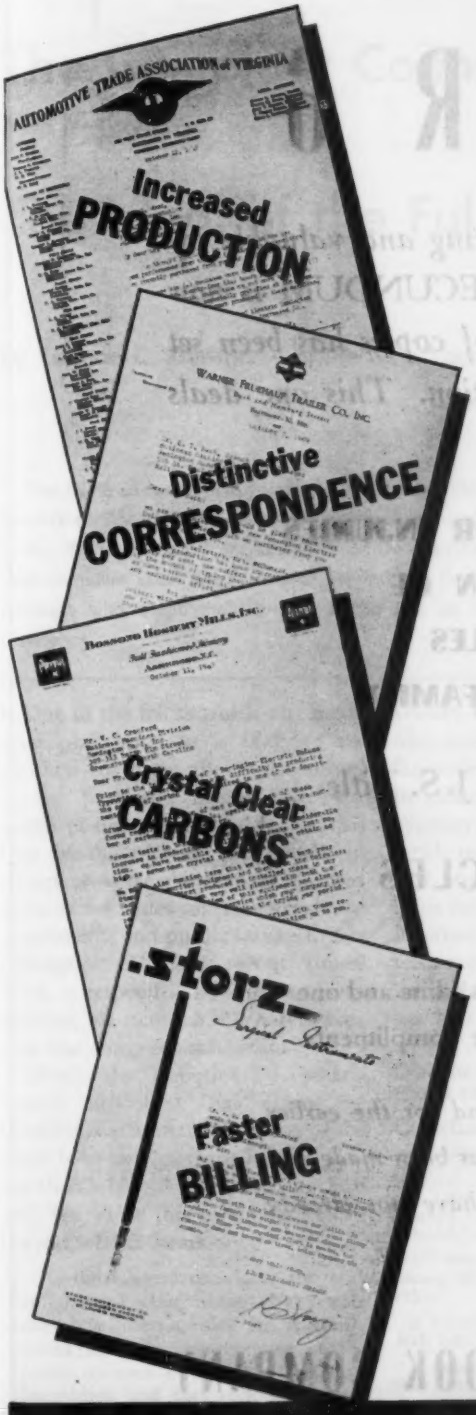

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The Compleat Counsellor:

The Ideal of the Fully Accomplished Lawyer

by **Eugene C. Gerhart** • of the New York Bar (Binghamton)

■ One hundred twenty-five years ago, De Tocqueville was able to describe American lawyers as "the only enlightened class which the people does not mistrust". Would he say the same today? Mr. Gerhart's article describes the "ideal lawyer"; he offers sage comment upon the defects of the modern profession and praise for its many members who spend their lives trying to live up to the ideal of the "compleat counsellor".

■ One of the tricks which our memories play upon us is that we are inclined to forget the shortcomings of the past and overevaluate the merits of the "good old days". Is this true of the rôle of the lawyer in America? Were the men of the Bar of former decades superior in talents, attainments and public service to our colleagues of more recent times? With a respectful bow to Sir Izaac Walton, we may ask, "Wherein consists 'the compleat counsellor'?"

Alexis de Tocqueville, young French aristocrat, has given the world as fine a picture as exists of the place held by American lawyers during the Golden Age of the American Bar. He wrote this of the American lawyers of 125 years ago:[1]

> As the lawyers constitute the only enlightened class which the people does not mistrust, they are naturally called upon to occupy most of the public stations. They fill the legislative assemblies, and they conduct the administration; they consequently exercise a powerful influence upon the formation of the law, and upon its execution.

Few lawyers of any age would merit the compliment bestowed upon Daniel Webster by Charles Warren who said that the 1830 term of the Supreme Court "may with justice be called Daniel Webster's Term".[2] Webster stands forth as one of the great molders of our Government and our constitutional law. Where is his counterpart today? Has the Bar forsaken its obligations of service so well exemplified in the past by distinguished public servants like Samuel J. Tilden?

Criticism of the Bar Is Not New

Criticism of our profession has always existed. Barristers in England have been charged with "intellectual and moral prostitution",[3] for their willingness to argue either side of a cause. The venerable Dean Pound in 1906 shocked American lawyers out of complaisant self-satisfaction with his epochal address on "The Causes of Popular Dissatisfaction with the Administration of Justice".[4] Leaders of the Bench and Bar, such as former Chief Justice Stone[5] and New Jersey's Chief Justice Vanderbilt,[6] have pointed out some of the shortcomings of the modern lawyer. Holmes wrote in 1896 that, "For the last quarter of a century a large part of our best talent has gone into business rather than into politics, doubtless because it was needed more there and therefore the rewards were higher."[7] Perhaps nowhere has the frequent criticism of the "financial bar" of New York City been more vehemently expressed than in *Reports* I and II of the SEC dealing

1. 1 De Tocqueville, *Democracy in America*, (World's Great Classics Series, New York: The Colonial Press, 1899) 284.

2. 1 Warren, *The Supreme Court in United States History*, (Boston: Little, Brown & Company, 1947) 713.

3. 2 *Law & Lawyers*, (Philadelphia: Carey & Hart, 1841) 240.

4. Reprinted in *29 American Bar Association Rep.* (Part I) 395.

5. Stone, "The Public Influence of the Bar", 48 *Harv. L. Rev.* 1 (1934). "Steadily the best skill and capacity of the profession has been drawn into the exacting and highly specialized service of business and finance. At its best the changed system has brought to the command of the business world loyalty and a superb proficiency and technical skill. At its worst it has made the learned profession of an earlier day the obsequious servant of business, and tainted it with the morals and manners of the market place in its most anti-social manifestations. In any case we must concede that it has given us a Bar whose leaders, like its rank and file, are on the whole less likely to be well rounded professional men than their predecessors, whose energy and talent for public service and for bringing the law into harmony with changed conditions have been largely absorbed in the advancement of the interests of clients." *Id.* at 7.

6. Vanderbilt, *Men and Measures in the Law* (New York: Alfred A. Knopf, 1949), Chapters 1 and 2.

7. Holmes, "The Bar as a Profession", in *Collected Legal Papers* 153 (1921), at 158. And see Warren, *A History of the American Bar* (Boston, Little Brown & Co. 1913) 442; Stephens, "Fifty Years of Legal Change: The Lawyer of 1949 and the Lawyer of 1900", 35 *A.B.A.J.* 897, November 1949.

with corporate reorganizations published in 1937. Robert T. Swaine in his reply to this censure succinctly summarized it. After pointing out the conflict between "insiders" and "outsiders" in such reorganizations, he summed up the SEC's criticisms in these words:[8]

> Over the camps of both "warring factions" hover another class of vultures, members of "the select financial bar," who have "forsaken the tradition that its members are officers of the court," have "discarded" "professional standards" and, being organized "on the large scale of mass production," with "over-specialization," "offices composed of dozens of lawyers, a huge overhead and consequent artificial standards," have "monopolized" "the practice of financial law," into "relatively few firms" and enabled themselves to set "monopolistic prices" on legal services.

Strong words![9] There is ample evidence that American lawyers today are becoming increasingly aware of their own deficiencies. They are presently conducting a survey of their own profession.[10]

With some 170,000 lawyers in America, it is not unusual that legal practice should exist in a variety of forms. The individual practitioner, engaged in general practice, is only one type, although probably the most numerous. Other fields for legal specialization include practice in the tax, labor law and similar fields, law teaching, legal writing and editing, law librarian, law secretaries, legal aid work, judicial administration, civil service and government counsel, municipal, state and federal law posts, and house attorney for large corporations.[11] These specialties have undoubtedly arisen because of the needs developed in the community itself, as Holmes implied.

Shortcomings of a Few Should Not Condemn Bar

It is rather pointless to indict an entire profession because of the shortcomings of those who infest its fringes. As the late William L. Ransom stated while President of the American Bar Association:[12]

> . . . no matter how sharply and savagely some people talk about some lawyers or all lawyers, the fact remains that in American life the great body of the people really trust their lawyers in a way that they do not trust men in in any other business relation, and that places on us a responsibility as lawyers and as members of a system of administering justice.

What, then, were the attributes of the "well rounded professional men" of an earlier day? Wherein are we lawyers today deficient in carrying out our professional duty to the public? In short, what makes a lawyer "the compleat counsellor"?

What Are Basic Obligations of the Advocate?

There is an old saying among laymen that a lawyer who does not try cases is not much of a lawyer. This is an uninformed view because the ratio of trial counsel to office lawyers, of barristers in England to solicitors, is small indeed.[13] Most lawyers do not try cases in court. Yet in the layman's mind, the primary obligation of the lawyer is advocacy. Perhaps it is the advocate who is the chief dramatist of the law. Laymen as well as lawyers can thrill at the utter fearlessness of Lord Coke, sometimes described as "perhaps the greatest lawyer that ever lived", standing up to his King and saying that, "the king ought not to be under any man, but under God and the law."[14]

It is the trial lawyer, most often defense counsel, who has opportunities to stir the deepest human emotions, and thus make the most vivid impressions upon laymen. A great English barrister, Thomas Erskine, in defense of a free press argued in the *Paine* case:[15]

> I will forever, at all hazards, assert the dignity, independence, and integrity of the English bar, without which impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end.

In America, few lawyers will ever attain the prominence of a Daniel Webster. It is unlikely that there will be opportunities in the future to shape constitutional law to the extent that he did. Yet there are still great opportunities for great advocates. John W. Davis today is one whose forte is advocacy. Described as the "leader of the U. S. bar",[16] he is famous for his exposition on appeal of causes popular and unpopular. He has the unique distinction of having argued before the United States Supreme Court "oftener than any other lawyer in his-

8. Swaine, " 'Democratization' of Corporate Reorganizations", 34 *Col. L. Rev.* 256, 258 (1938).

9. As to the so-called "law factories" in New York, a recent *Fortune Magazine* survey on the U. S. Bar says this: "But the vicinity of Broad and Wall is the true center of corporate practitioners. Hereabouts are such firms as White and Case; Sullivan and Cromwell; Shearman & Sterling & Wright; Cravath, Swaine & Moore. Each has more than twenty partners and approximately seventy-five additional lawyer associates. Each man tends to become a highly specialized operator in some such field as taxes, security issues, real estate, labor contracts, corporate reorganizations, or anti-trust." *Fortune Magazine*, (May, 1949), page 172. Mr. Swaine has recently published an answer to critics of this type of legal practice. See Swaine "Impact of Big Business on the Profession: An Answer to Critics of the Modern Bar", 35 *A.B.A.J.* 89; February, 1949. *Cf.* Report of the Securities and Exchange Commission, dated May 10, 1937, on Protective and Reorganization Committees, Part I, pages 211-218.

10. See *Memorandum Concerning Complaints Against Lawyers*, submitted to the Survey's Advisory Committee of Laymen by Reginald Heber Smith and dated February 11, 1949.

11. See Stephens, *Finding Your Place in the Legal Profession*, reprinted in Vanderbilt, *Studying Law*, (New York City: Washington Square Publishing Corporation, 1945) 685-94. Placement office records from Harvard Law School show that from the period February 1, 1948, to March 1, 1949, 80 per cent of the graduates were known to be placed, and that they entered various fields in the profession as indicated below:

Law firms	74%
Independent practice	4½%
Corporations	4½%
Government	6%
Clerkships (Judges)	3½%
Teaching	1½%
Banks	1½%
Insurance	1½%
Further study	1½%
Non-legal	1%
Miscellaneous	½%

(Source: *Harvard Law School Bulletin*, No. 6, July, 1949, Page 5).

12. Address of the Hon. William L. Ransom, President of the American Bar Association, at the Annual Meeting of the Indiana Bar Association on September 6, 1935, reprinted in 11 *Ind. Law Jour.* (December, 1935) 151, at 152.

13. "As compared to perhaps 100 barristers who actually make a decent living out of their practice in London, there are over 5,000 active solicitors, some working by themselves, many working in firms similar to those known to us." W. D. Whitney, *Inside the English Courts*, reprinted from 3 *The Record of the Association of the Bar of the City of New York*, December, 1948, page 369.

14. Palmer, "*Edward Coke, Champion of Liberty*," 32 *A.B.A.J.* 135; March, 1946, at page 138. And see 5 Holdsworth, *A History of English Law* (Boston, Little Brown & Co. 1927) 429-431.

15. Stryker, *For the Defense* (Garden City, New York: Doubleday & Co., Inc., 1947), 217.

16. "The U. S. Bar", *Fortune Magazine* (May, 1949) 91.

tory".[17] More recently the world provided a stage for another great American advocate to point the accusing finger of civilization at the leading Nazi war criminals at Nuremberg. Mr. Justice Jackson's opening address as America's Chief Prosecutor at the War Crimes Trials in Germany has been compared to Sheridan's famous phillipic against Warren Hastings.[18] It is still true today that opportunities exist for eminent advocates.

Advocate Must Attain Lofty Standards

What qualities of intellect, of personality, of character are most needed in advocacy? Edward W. Cox, noted English barrister of a century ago, gives the advocate lofty standards to attain:[19]

> Scarcely need you be reminded that such duties and responsibilities will demand on your part uncommon capacities; great self-control; much courage to resist as well as to dare; stern rectitude; a fine sense of honour; a lofty morality; a profound sentiment of religion; a large Christian charity; a generous ambition; a noble disinterestedness,—an ever present consciousness of responsibility to Heaven for the talents that have been given to you, and to your fellow-men for the right use of the privileges with which they have entrusted you. So many and such various qualifications are required for the Advocate, so high is the standard of his acquirements, so much of natural ability and so much of cultivation are essential to his success;—when that success is attained, he has so much to do, and so much to shun, so many are his duties, so frequent the occasions for the exercise of his virtues, so countless the forms in which his capacities are tried, that of his own strength he cannot hope to come with credit out of the ordeal. He must turn for assistance to Him who alone is a very present help in time of trouble, and bending before the throne of Heaven he will find confidence in his humility, and strength in his confession of weakness.

In England, the lawyer or legal adviser is called a "solicitor". He performs all the usual duties of an American attorney except (1) trying cases or arguing appeals; (2) drafting pleadings; and (3) giving legal opinions. In England he is forbidden to practice in these three fields which are reserved for barristers. Counsel, which is the English word for barrister, just as lawyer and attorney are the equivalent of solicitor, perform only these three functions. "Ninety-five percent of all the work done by lawyers is in England done by solicitors. With the very rarest exceptions, all American lawyers are really solicitors."[20] It has been recently said that the era of the Websters, Choates and Darrows is over and that "in a sense, great contemporary advocates like John W. Davis, George Wharton Pepper, and Robert P. Patterson are relicts."[21] While this conclusion may be questioned, no one can deny that many lawyers today never see a courtroom, and do confine their practice to the solicitor's work, that is, advising businessmen and other clients.

This type of practice, as Holmes indicated, during the last seventy-five years has drawn much fine legal talent where "the rewards were higher". This type of law practice is inclined to be preventive law, that is, preventing matters from reaching an issue, rather than the trying and winning of an issue which is the advocate's field. The impact of the corporation upon the lawyer's life has been tremendous. Not only has the corporation provided him with much larger fees than were previously possible, but it has provided the legal adviser with an opportunity to exert a strong influence for good or for ill in business councils.

What is the obligation of a professional adviser of a great corporation? Here is the answer of William T. Gossett, general counsel of one of the world's great industries, the Ford Motor Company:[22]

> The lawyer representing business today, if he is to live up to the challenge of his new responsibilities, will endeavor to avoid the errors of the past; he will shun the kind of advice which is motivated by a desire to preserve the *rubrics* of a vanished era; he will be alive to the social, economic and political implications of the time; he will avoid a narrow, short-sighted approach to his clients' problems; he will act with due regard for the social responsibilities of the enterprise; he will have the courage to advise against a business program or device which, although legally defensible, is in conflict with the basic principles of ethics. *Failing* this, he not only will be ignoring his obligations to society, he will be doing a disservice to his client, who may find himself in the position of winning a *legal battle* but losing a *social war*.

Profession Must Improve Administration of Justice

One of the basic obligations of the legal profession, individually and collectively, is the constant improvement of the administration of justice. There is little question but that the foremost efforts in this direction have been made by bar associations, particularly the American Bar Association. Yet any such association is merely a collection of individual lawyers, some of whom are its leaders. It therefore behooves the individual lawyer, not only to so practice as to work toward the goal of improving legal administration, but also to lend his efforts to the collective work being carried on by bar associations. One of the recent great accomplishments in this field was the enactment

17. *Ibid.*

18. "No collection of the world's great orations will henceforth be complete without the masterly opening statement of Justice Robert H. Jackson at the trial in Nurnberg of the twenty Nazi war chiefs. ". . . Sheridan's speeches were immortalized by Macaulay, and stand forth in our literature among the classic examples of argument and invective. When a Macaulay of the future writes his work on the trial of the Nazi twenty, Jackson's eloquence is sure to be placed on the same high level as that of his distinguished predecessor of a century and a half ago." Editorial, "Jackson's Great Speech", *St. Louis Post-Dispatch*, November 23, 1945.

19. Cox, *The Advocate* (London: John Crockford, 1852) 260. See also Philip, *The Art and Ethics of Advocacy* (Edinburgh: William Blackwood and Sons, Ltd.), reprinted from *The Accountants' Magazine* for January-February, 1947. See editorial, "The Lawyer's Entire Devotion to His Client", 34 *A.B.A.J.* 805; September, 1948; "Advocacy" in Osborne, *The Problem of Proof* (Albany, Boyd Printing Co. 1947), Chapter 5, especially page 84.

20. Whitney, *loc. cit. supra*, n. 13, at 366-367.

21. "The U. S. Bar," *Fortune Magazine* (May, 1949) 176.

22. Address at the Sixth Conference of the Inter-American Bar Association, Edison Institute, Dearborn, Michigan, May 24, 1949. Mr. Gossett also said, "The future, it seems to me, calls upon us to combine, if we can, the eloquence of the advocate, the structural sense of the legal architect, and the wisdom of the great judges of the law, who never have failed to see that the law is a part of life and cannot be separated from the aims, the ethics, the hopes and the will of the people."

unanimously by Congress of the Administrative Procedure Act[23] in 1946, largely as the result of the tireless work of some of the present day leaders of our profession.

Improving the administration of justice is not limited to monitoring the observance of the canons of judicial and professional ethics or the drafting of statutes. The objectives[24] of the American Bar Association in this field include the following:

1. Integration of the judiciary through the establishment of judicial councils and judicial conferences.
2. Delegation of rule-making power to courts of highest jurisdiction, with consequent improvement of pleading, trial practice and appellate procedure.
3. Improvement of the jury system.
4. Simplification of the law of evidence.
5. Improvement of administrative tribunals.
6. Improvement of methods of judicial selection.

In our form of government the courts are a fundamental branch, and without them, democracy as we know it, liberty as we have enjoyed it, and property as we have owned it, could not long endure. This is one branch of the law that is the peculiar province of the lawyer. Judge John J. Parker has reminded us that, " . . . if the lawyer wishes to preserve his place in the business life of the country, he must improve the administration of justice in which he plays so important a part and bring it into harmony with that life." And he adds that," . . . nothing else that we can possibly do or say is so important as the way in which we administer justice."[25]

Is a lawyer a well-rounded professional man who is not devoting a part of his life to improving the administration of justice?

Lawyers Should Be Leaders of Public Opinion

At the turn of the century, Holmes said that, " . . . we need all the ability we can get in our government at the present time and that we shall want, if we can get them, trained lawyers . . . " in our legislatures.[26] Many clients prefer that their lawyers avoid open participation in politics, although they are delighted to have their lawyer cultivate good political connections. It has been truly observed that many clients like to be represented by a law firm whose leading partners are members of opposite political parties, "so that the partnership may have a foot in each camp."[27] This leads many young lawyers today to side-step taking a public position on vital public questions because this might hurt their practice. They prefer to operate behind the scenes, and they shun public office-holding entirely. Such an attitude on the part of lawyers leaves them no claim to leadership in an American community. It may well be questioned whether such an attitude even wins the admiration or respect of the client. What most people want is a lawyer who will stand up and fight for his viewpoint. Suppose a lawyer does turn down a case—a case with principle—because he feels it will hurt his practice. Is he a *real* lawyer? Certainly he is no advocate! Despite the clamor, the public is more inclined to estimate a lawyer's prestige by the fight which he makes than it is by the side that he represents. If, therefore, lawyers are to be leaders of public and political opinion, they must take positions on important public issues—or yield the rôle of leader to him who will. When a right-thinking lawyer does undertake to lead public opinion in his county, the results are sometimes startlingly good![28] Today, with the radio, the newspaper and now television, there is an even greater need for the lawyer to be a leader of public and political opinion, because he is a trained analyst and a minister of justice.

Legal Profession Is Source of Diplomats

From the earliest days of the Republic, the legal profession has been regarded as a source of candidates to conduct the foreign affairs of the nation. John Marshall, before he became Chief Justice, served as an envoy to France to negotiate with Talleyrand concerning American relations with France.[29] He was not merely a lawyer, but also a politician, diplomatist and statesman. Elihu Root's most notable achievements were in forwarding international peace, in helping to found the World Court, and in attempting to improve our international relations with Latin America. More recently we have seen counterparts of these men—obviously there were many others—in former Chief Justice Hughes' work with the Permanent Court of International Justice, and Mr. Justice Jackson's participation in the Nuremberg Trials. Despite the present possibilities of establishing a world order based on law, the average practitioner regards international law as something so vague and esoteric that it can be dismissed from his everyday practice. With what result? The Chief Justice of New Jersey is authority for the following statement:[30]

> So little had international law been taught in the law schools and so unfamiliar with it was the bar of the entire country that when it became evident that World War II was inevitable and that an enlightened professional view of international law was essential to the generation of sound public opinion on foreign affairs, it became necessary for the American Bar Association to draft the services of the relatively few academic authorities on the subject, notably Judge Manley O. Hudson, and send them forth throughout the country as evangelists preaching a gospel well known to

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23. 60 Stat. 237, 5 U.S.C.A., §§ 1001-1011.
24. See the handbook prepared by the American Bar Association's Section of Judicial Administration published in 1949, entitled, *The Improvement of the Administration of Justice* 6.
25. Parker, *Improving the Administration of Justice*, 27 A.B.A.J. 71; February, 1941, at page 76.
26. "The Bar as a Profession," from *Collected Legal Papers* (New York: Harcourt, Brace & Company, 1921) 158.
27. Vanderbilt, *Men and Measures in the Law*, (New York: Alfred A. Knopf, 1949) 46.
28. Reed, *Twenty Years of Government in Essex County, New Jersey* (New York: D. Appleton-Century Company, 1944).
29. 2 Beveridge, *The Life of John Marshall* (Boston: Houghton Mifflin Company, 1916) Chapters VI, VII, and VIII.
30. Vanderbilt, *Men and Measures in the Law* (New York: Alfred A. Knopf, 1949) 54-55.

Lawyer Reference Plans:

A Manual for Bar Associations

by **Robert H. Jackson** • Associate Justice of the Supreme Court of the United States

The Survey of the Legal Profession published its report on Lawyer Reference Plans on November 21. That evening President Gallagher made a coast-to-coast broadcast on the subject and referred to the work in this field being done by the Association's Committee on Public Relations and its special Committee on Lawyer Reference Plans.

The *Journal* asked Mr. Justice Jackson to comment on this Survey report because of his long-standing interest in this whole field. Many will recall his address to the Junior Bar Conference in 1939 when he was Solicitor General of the United States and for which he selected the arresting title "Briefless Barristers and Lawyerless Clients".

Copies of the report "Lawyer Reference Plans" may be obtained without charge by applying to the Survey of the Legal Profession, 60 State Street, Boston 9, Massachusetts.

Lawyers, unfortunately, seldom are able to give much thought to the place and function of their profession in society, because they are preoccupied with the insistent problems of clients which help pay the rent. But they should recognize that, as society is organized in this country, the law office is the very base of the pyramid-like structure on which we depend to administer justice. "It too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs." *Hickman v. Taylor*, 329 U. S. 495, 514-515. The law office indeed is the vestibule to the courts.

The Bar is given a monopoly of the privilege of rendering legal services. This puts it under a responsibility unlike that of traders. The profession conducts the baffled layman over the rough highway to justice, along which it maintains its own private toll gates. The layman often complains, and sometimes with reason, that the toll is more than the journey is worth and that the cost of legal services places them beyond the reach of a large part of our people. Despite the rather impressive incomes of a few leaders of the Bar (far less enviable after taxes), the law is not on average an overpaid calling. Its rewards are much under those which society pays for some services that seem to me of less social value. I think few really begrudge the lawyer his lot, which traditionally is "to live well, work hard and die poor". Certainly no one acquainted with the functions and conditions of the profession would expect to improve the administration of justice by measures that would further distress an economically hard-pressed Bar, which in some cities already is demoralized by excessive numbers and sharp competitive practices.

Today any profession that neglects to put its own house in order may find it being dusted out by unappreciative and unfriendly hands. Society shows a growing disposition to call the professions to account for the use made of their privileges. The medical and dental professions have fallen under critical examination, not only in England but also in the United States. Society, of course, has a legitimate and immediate interest in the faithful functioning of the Bar. It is only the part of wisdom for the leadership of any profession to anticipate the problems and difficulties of those it undertakes to serve and to remedy them before they grow to public grievances.

The American Bar Association, anxious about the economic problems of the Bar, chose a distinguished Council to make a broad survey of the profession and induced Reginald Heber Smith to become its director. This group has now made available its report on Lawyer Reference Plans. Its sponsorship would alone assure it of a hospitable reception by lawyers. And its substance is worthy of its sponsors.

In the nature of things, the well-to-do have always been able to get good legal service. It would be a disaster

for the Bar, however, if it could fairly be said that only the well-to-do are well served by it. That fortunately cannot be justly said, so far as I can observe. No better services are rendered in the courts than those by assigned counsel for indigent persons, and lawyers everywhere are rendering such service without fee and often without thanks. The causes of labor and of minority groups are now championed with conspicuous competence as well as zeal. Legal aid societies, fostered in large part by members of the Bar, try to see that poverty does not work a denial of legal service. The development of this service was, as we all know, immensely stimulated by the survey called "Justice and the Poor", by Reginald Heber Smith,—that superb study of a neglected duty that spurred the lawyers better to discharge their collective responsibilities. It is not too much to say that the modern movement to put justice within reach of the poor dates from this study and that the whole project of legal aid owes its strength, if not its origin, to the thoroughness, objectivity and vision of the Smith study. Now he gives us another vital study which places the profession even deeper in his debt.

What is the problem to which the present report on lawyer reference plans is addressed? It is concerned with the difficulties in obtaining legal service that beset what we may roughly call the middle class, that numerous group that is neither well-to-do nor sufficiently depressed to seek or qualify for free legal aid. The reference service is not for those whose need is charity, and it does not dispense any dole payable in legal service. One of its beneficiaries is the hard-working, self-respecting person who is desirous, within his meager means, of paying for what he gets but who does not know where or how to find the lawyer who will serve him for what he can pay. The other beneficiary is the lawyer ready to render for referred clients honest service of approved competency for a moderate stated fee. The two are brought together by an arrangement offered, managed and supervised by the organized Bar.

Small Income Groups Have Legal Problems

Small income groups have legal problems almost as complicated as those of a business executive. Humble homes are affected by mystifying provisions of leases for living quarters under which the tenants may be evicted and by the problems of rent controls. They buy goods on the instalment plan and may be subject to overcharge or unjust repossession. Their little affairs raise questions of law concerning debtor and creditor, lessor and lessee, domestic relations, torts and crimes. But their questions often do not involve enough to be worthwhile of solution by lawyers with large overheads to meet. Must they then remain unanswered?

At the same time, we have and continue to produce so many lawyers that a large number hold on and exist by a perilous margin, and some turn to living by methods that bring the profession no credit. The lower-income lawyers, who are not always either the less competent or less trustworthy ones, need clients, while clients are in need of them.

Lawyer Reference Service Helps To Solve Problem

Let us look at the reference service from the viewpoint of persons whose means are small but who wish, within their means, to pay for the service they need. Many of these do not personally know any lawyer. How will a prospective client find one? The classified telephone directory is nothing but a list on which the name of the police court lawyer, the corporation lawyer, the real estate specialist and the divorce attorney all look alike. He knows vaguely that lawyers, like doctors, have their specialties, that some would and some would not be prepared to deal with his little problem, and that many would demand, and perhaps reasonably, more than he can afford to pay. He has heard all sorts of tales about lawyers' fees. Knowing that there are these differences, how will he find out which is which? Maybe he can

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find some acquaintance who knows, or knows somebody who knows, a lawyer to recommend. But, even so, few laymen will know whether that lawyer is engaged in the line of practice needed or what his scale of fees may be. The prospective client is likely to give up his search and blunder along without advice or help. So we have a client lost to some lawyer and the lawyer out of reach of the client, for want of a medium of contact. That is where the bar association-managed lawyer reference service comes into play.

The problem in its simplest terms is whether, and how, the Bar can provide the machinery to guide this kind of a client into a law office where he will fit. Since 1937 the bar associations of some of the larger cities have been experimenting with plans to this end. The complications of any plan for bringing low-cost legal service to those who are willing and able to pay seem greater than the difficulties of rendering free legal aid to those who cannot pay at all. Associations have met and most of them have overcome innumerable objections and hurdles. This report is not devoted to mere theories. It is a factual study of these actual experiments, and what it teaches are lessons of experience.

How and where should such a service be set up, and is it better managed by a layman or a lawyer?

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Vestigial Remnants in the Law:

The Decline in Glory of Ancient Officers

by **Ben W. Palmer** · of the Minnesota Bar (Minneapolis)

▪ These are hard times for the bailiffs, the constables and the marshals whose presence is scarcely noticed in our courts. In this delightful article, Mr. Palmer summons up remembrance of things past, and writes of the days when the proudest noblemen of the land held those offices and commanded fear and respect second only to the sovereign himself. This is the first of a series of four articles.

▪ Do you ever stop to think of bailiff, constable, alderman, mayor, coroner and sheriff as vestigial remnants? Do you see any connection between any of these and the vermiform appendix that kicks up and causes trouble, the side splints of the horse's foot that once were the toes of his five-toed ancestor, the vanishing hind limb of the whale embedded in his body? Or the pineal gland that snuggles behind the third ventricle of your brain or your now useless caudal appendage—I will not call it a tail, lest like some famous person, you recall with what feelings of mortification you look upon a monkey.

As I waited to try a case the other day and looked at the bailiff in his little box-like enclosure just big enough for his chair, a retired neighborhood grocer rewarded for his party service, unnoticed ball-bearing of the body politic oiled out of the public treasury, I mused upon the simplicity of his duties: pounding with his gavel, announcing the court's arrival, occasionally opening a window or getting a glass of water for a juror or a witness. I also mused upon his ancestry—institutional, not biological, since he obviously came from the Emerald Isle—and upon his former high estate. I remembered Holmes' reference to the clavicle in the cat which "only tells of the existence of some earlier creature to which a collar-bone was useful"[1] and I recalled what a very useful collar-bone the bailiff was centuries ago.

In France the bailiff *(bailli)*, or seneschal in feudal days, was a noble officer of importance. Among the great officers of the crown of France a grand-seneschal figured until the reign of Philip Augustus (1165-1223). Being about to set forth on the crusade, by ordinance of 1190 he arranged for surveillance of the royal provosts *(prévots)* by bailiffs whose office was military in origin. They organized and led the men who by feudal rules owed military service to the king. They had also judicial functions, holding periodical assizes. Royal cases and those in which a noble was defendant were reserved for them, and they heard appeals from sentences imposed by inferior royal judges and by the seignorial justices. For long they were the king's principal representatives in the provinces. They were the first public officials in modern times to receive a regular money payment for their services.[2]

Meaning of "Bailiff" Has Changed Greatly

In England the word bailiff was first applied to the king's officers generally, such as sheriffs and mayors and more particularly to the chief officer of a hundred. The bailiff, with the steward and the reeve, formed a sort of petty curia of any landlord. Glanvil *(circa* 1187) spoke of a bailiff as a general agent to dispose of lands and goods. The bailiff as such was neither the lord's tenant nor his serf, and courts having jurisdiction over mutual claims of lord and vassal could not reach the bailiff for failure to perform his duties. This led to the invention of our action of account. The word "bailiff", however, shifted its meaning and by the end of the fifteenth century, account could be used against certain types of bailees who had to be described as "bailiffs", although this allegation was not traversable. Bailiffs held borough courts and their judicial function was evidenced by the ex-

1. Holmes, *The Common Law* (Boston 1881) 35.
2. 2 *Encyclopaedia Britannica* (14th ed. 1946) 937; Emerton, *Medieval Europe* (Boston 1894) 427-429.

press withdrawal of pleas of the crown from bailiffs by Chapter 24 of Magna Charta. In Chapter 28 their judicial activity involving compurgation is expressly referred to.

Today we think that there is quite a gulf between the attorney and the bailiff. Between Bracton's day, however, and the rise of professional attorneys in the reign of Edward I (1239-1307) the bailiff was only gradually distinguished from the lawyer. This resulted from a development of the attorney's function, specialized through successive rules of court. "Bailiff" of course suggests "bail" which goes back to the medieval frank-pledge system or perhaps to the giving of certain pledges for the payment of wergeld or blood-money. These practices involved the bailment of a person to his sureties, who joined with him in promising his appearance for trial or some other purpose. But principally we know of the bailiff as the sheriff's under-officer who for centuries executed writs and processes and made arrests in the king's name.[3]

Bailiff Recalls Woes of Micawber, Becky Sharp

Bailiff, of course, reminds us of the legal troubles of Micawber, "one destined" (in his own words) "after a protracted struggle, at length to fall a victim to pecuniary involvements of a complicated nature." And was it not Becky Sharp's father who "descended to the grave, after two bailiffs had quarrelled over his corpse"? Thackeray here evidently succumbed to the once-prevalent but erroneous notion that a dead body might be arrested for debt.

But our bailiff quarrels over no bodies, dead or alive, leads no troops, presides over no tribunals. How shrunken is his "bailiwick" from the wick or vicus, town or village to his fenced-in chair. His neck is no longer clothed with thunder. No longer does he discharge the bolts of Jove from Olympian or empyrean heights. We no longer, in many states, even permit him to awaken the reverberent echoes with "Oyez! Oyez! Oyez!", but confine him to a prosaic announcement of the court's impending arrival, emphasized, but only gently, with his little gavel—and perhaps on a rubber pad lest it be too distracting or mar the wood. And some of the comic strips and radio scripts have given even that gavel to the judge upon the bench.

The bailiff makes us think too of the constable, perhaps crony of his own justice of the peace, star of the first magnitude in that local luminary's court, impressing small boys with his star and affectation of all the majesty of that law that has broadened down the centuries from precedent to precedent. But the sophisticated adult ignores him or looks upon him as the listless and not over-ambitious holder of a job that is next to loafing, unless irritated by his complicity with the justice of the peace in catching the unsuspecting motorist in a traffic trap for an increase of fees. And notwithstanding his affectation of dignity, the constable may be plagued by and be the butt of the practical jokes of teen-age boys.

Constable Too Has Suffered a Mighty Fall

But like the bailiff, the constable was once a man of high estate. We never think of horses or of stables in connection with the constable. But the Byzantine *comes stabuli* was originally the imperial master of the horse, a great noble and officer of state under the later Roman Empire. The Frankish kings borrowed the title from the East; the office expanded under the Capetian dynasty and in the eleventh century the constable was not only superintendent of the royal stud but had an important command in the army. His office increased in importance and by the fourteenth century he was recognized as commander in chief of the army. He became chief subject in the state, but Richelieu abolished the office in 1627. It was to the constable that Henry V sent word defiantly before Agincourt that

> Those that leave their valiant bones in France,
> Dying like men, though buried in your dung hills,
> They shall be famed; for there the sun shall greet them,
> And draw their honors reeking up to heaven.[4]

In England the title of constable was unknown before the Conquest, but after that he appears as quartermaster general of the court and of the army. He was one of the principal officers of the king's court and household. Under the Norman and Angevin kings the term came to be applied to any high military command. Under the Statute of Westminster of 1285, a chief or high constable was appointed in every hundred; while in the old tithings and villatae the village bailiff was generally appointed a petty constable. In the seventeenth century it was the constables of the townships and hundreds who in effect exercised the powers formerly entrusted to these communities. They therefore were the persons whose special duty it was to raise the hue and cry. They were generally the appointees of the justices of the peace and acted on their instruction.[5]

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3. 2 Holdsworth, *History of English Law* (3d ed., Boston 1923) 316-317; Radin, *Handbook of Anglo-American Legal History* (St. Paul 1936) 41, 166, 465; Plucknett, *Concise History of the Common Law* (Rochester. 1929) 279; 2 Pollock and Maitland, *History of English Law* (Cambridge 1911) 221; 1 Taylor, *Origin and Growth of the English Constitution* (Boston 1889) 462; 2 *Encyc. Brit.* 437; 1 Murray, *New English Dictionary* (Oxford 1888) 626. That proper names "Bailey" and "Bayliss" come from "bailiff", see Weekley, *The Romance of Words* (2d Ed., New York 1913) 175. "Bailiff" and "bail" evidently have no connection with "bailey", meaning an open space in a fortification, sometimes known as the "ward". If more than one line of fortifications were present, there was an inner bailey and an outer one. This is the word from which the Old Bailey in London derived its name, since it was in one of the baileys of the old city walls. This was "that vile place, in which most kinds of debauchery and villainy were practiced, and where dire diseases were bred, that came into court with the prisoners, and sometimes rushed straight from the dock at my Lord Chief Justice himself, and pulled him off the bench." Dickens, *A Tale of Two Cities*, Book 2, c. 2; 2 *Encyc. Brit.* 937; 1 Murray, *New English Dictionary* (Oxford 1888) 625.

4. *Henry V*, Act IV, Scene iii, 100.

5. 1 Holdsworth 35, 39; 3 *id.* 599-604. See also 4 *id.* 123 and note on questions of origin of the constable with the Statute of Westminster, and 1 Anderson, *Treatise on the Law of Sheriffs, Coroners and Constables* (New York 1941) 2-4. See also 6 *Encyc. Brit.* 294; 7 *Encyclopedia Americana* (1938) 551; 1 Taylor, *Origin and Growth of the English Constitution* (Boston 1889) 454, 581; 2 *id.* 573. See 2 *id.* 555, note 3: "The lord high con-

The Marshal Recalls Dickens' Little Dorrit

As I cast my eye from the bailiff and the constable to the marshal, I thought of Little Dorrit, the child of the Marshalsea, whose first draught of air had been tinctured with Doctor Haggage's brandy. I thought of that prison formerly in Southwark, existing as early as the reign of Edward III and attached to the ancient court of the steward and marshal of the king's house. "An oblong pile of barracks building, partitioned into squalid houses standing back to back, so that there were no back rooms; environed by a narrow paved yard, hemmed in by high walls with duly spiked top . . . and a blind alley some yard and a half wide, which formed the mysterious termination of the very limited skittle ground in which the Marshalsea debtors bowled down their troubles."[6] Nearly three hundred years ago some of the sweetest notes that ever struck a bliss upon the air of a prison cell rose from the Marshalsea, for here George Wither wrote his "Shepherd's Hunting".[7]

In sharp contrast to the ill-apparelled inmates of the debtors' and smugglers' prison and to the marshal I was looking at, was the latter's glorious and resplendent ancestor. For centuries the marshal was a noble of high rank and of tremendous, almost royal power. His title came from the *maresçalci* or masters of the horse, of the early Frankish kings. Because of the importance of cavalry in medieval warfare, his position was of great military importance. His duties led naturally to keeping order in court and camp, deciding questions of chivalry and to the assumption of judicial and executive functions. By the twelfth century he had become commander of the royal forces and a great officer of state. After the Conquest, the marshalship became hereditary in England in the family that derived its surname from the office. The hereditary title of Earl Marshal originated in the marriage of William Marshall with the heiress of the earldom of Pembroke. In England the word marshal as commander of an army appears as early as 1214. The modern title of field marshal, imported from Germany by George II in 1736, is descended from the high dignity of the *marescalcus*. Marshals for keeping order, admitting and excluding those seeking access and for ceremonial arrangements existed not only at the king's court but in the entourage of great lords and churchmen. So in the Statute of 5 Edw. III, cap. 8 appears a marshal of the King's Bench to preside over the Marshalsea court and be responsible for custody of prisoners in the Marshalsea prison.[8]

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stable, whose office became extinct as an hereditary office in 1521, is created only for one day at the coronation." On the ancient power of the justice of the peace, see Palmer, "The Ancient Roots of the Law", 35 *A.B.A.J.* 634, August, 1949. On captures by land as falling to the court of the constable and marshal, and on the military law arising therein, see 1 Holdsworth 388; 4 *id.* 272; 5 *id.* 15; 7 *id.* 482; Thompson, *Magna Carta* (Minneapolis 1948) 87-90; 94-95; 347-350. For some famous English constables, see 3 Stubbs, *Constitutional History of England* (3d ed., Oxford 1884) 15, 42, 161, 232 (Percy, Lancaster, Somerset, Buckingham). On the high constable of the hundred in Maryland, see Craven, *The Southern Colonies in the Seventeenth Century* (Louisiana University Press 1949) 201-202.

6. Dickens, *Little Dorrit*, chapters 6, 7. See also *The Pickwick Papers*, chapter 21; 14 *Encyc. Brit.* 972.

7. Lucas, *A Wanderer in London* (24th ed., London 1924) 169.

8. 14 *Encyc. Brit.* 967; 1 Holdsworth 35. For a case about the court of the Marshalsea, see Thompson, *op. cit. supra* note 5, 276. On complaints of excess jurisdiction against the court of the steward and marshal, see Thompson, *id.* 89; 2 Stubbs, *op. cit. supra* note 5, 338, 346, 639. On the fiction that the defendant was in the custody of the marshal of the Marshalsea, see 1 Holdsworth 219-220. On the Bill of Middlesex and the custody of the king's marshal of Middlesex, see Radin, *op cit. supra* note 3, 196; Plucknett, *op. cit. supra* note 3, 145; 1 Holdsworth 220-222.

Contrast, for example, the marshal of today, especially a town marshal, with the marshal of the field in the conflict between Brian de Bois-Guilbert and the Disinherited Knight in Scott's *Ivanhoe*, chapters 8-9.

Lawyer Reference Plans

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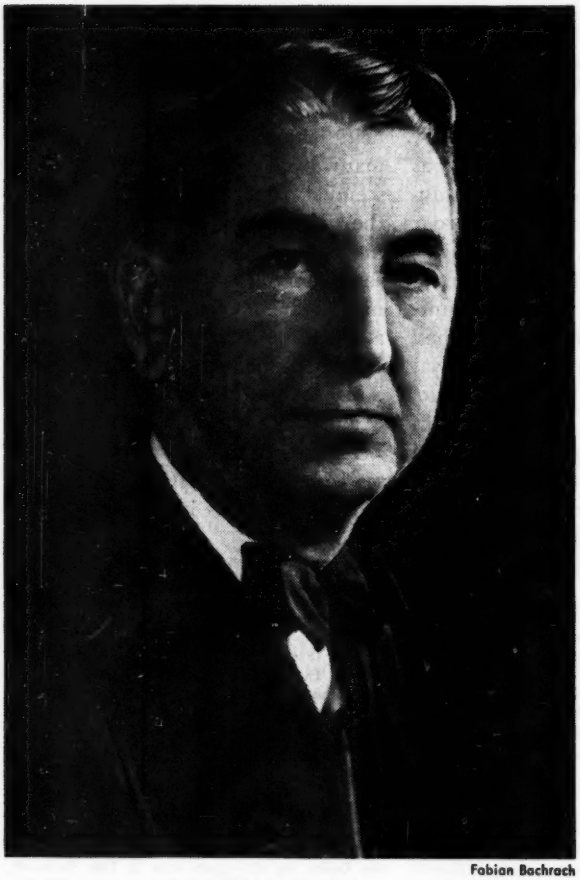
How shall the reference lawyers be selected, what obligations shall they assume, and what is their relation to the reference office? How shall the fee be fixed and assured? By what medium may the service be brought to the attention of laymen? Aside from the immediate fee, has the relation of attorney and client so established proved productive of other business for the lawyer? Does it prove satisfactory to the client? This study is devoted to those down-to-earth practical questions.

I am not going to dull the edge of this report by trying to summarize its contents. The authors have already boiled it down to the shortest form consistent with imparting the information essential to an understanding of the program. What I would do is to exhort those who have the welfare of the legal profession at heart to read, mark and inwardly digest this report. It deals with one of those problems that only the organized Bar can solve, and conditions which too long neglected may be exploited to plague our profession.



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TOM C. CLARK

SHERMAN MINTON

■ Seated at either end of the row of black-robed Justices in the solemn, dignified atmosphere of the Supreme Court of the United States, the two new members of the Court delivered their first opinions as Associate Justices on November 7, the Court's first decision day of the October, 1949, term. Mr. Justice Tom C. Clark delivered the opinion of the Court in *Treichler* v. *State of Wisconsin,* and Mr. Justice Sherman Minton spoke for the Court in *Commissioner* v. *Connelly*. In the former, Justice Clark ruled that a Wisconsin emergency inheritance tax violated the Fourteenth Amendment since it was levied on tangible property the actual situs of which was in another state. In the latter, Justice Minton declared that a civil service employee of the Coast Guard who became enrolled as a full-time member of the Coast Guard Reserve was not entitled to the $1,500 exclusion from taxable income allowed officers in the Armed Forces. Both decisions were without dissent.

Justice Clark now sits upon the Bench before which he argued many important cases for the Government during his four years' service as Attorney General. He has had a varied legal experience since his admission to the Texas Bar in 1922.

Born in Dallas, Texas, in 1899, Justice Clark attended Virginia Military Institute and the University of Texas. He received his A.B. degree from the latter in 1921 and his LL.B. from Texas in 1922. He was engaged in private law practice for five years until he became Civil District Attorney of Dallas County in 1927.

In 1937 he joined the Department of Justice as a special attorney in the Bureau of War Risk Litigation. He was assigned to the Antitrust Division a year later, and became Assistant Attorney General in charge of that division in 1943. During World War I he served with the 153d Infantry. He has been a member of the Association since 1945.

Mr. Justice Minton comes to the Supreme Court after eight years on the Bench of the Court of Appeals for the Seventh Circuit. Born in Indiana in 1890, he received his LL.B. degree from Indiana University in 1915 and an LL.M from Yale in 1916. Admitted to the Indiana Bar in 1916, he began practicing law in New Albany. His practice was interrupted by service as a captain of Infantry during World War I. In the twenties, he practiced in Indiana and Florida, becoming Public Counselor of Indiana in 1933.

A year later, he was elected to the United States Senate, where he was one of the leaders of the Administration forces during the controversial "court-packing" battle. In 1941 President Roosevelt chose him as an administrative assistant; later in the same year he was named to the Court of Appeals.

Counselor Goethe:

The German Poet as a Lawyer

by **Edwin M. Sears** • of the Colorado Bar (Denver)

This year marks the two hundredth anniversary of the birth of Johann Wolfgang von Goethe, Germany's greatest poet and one of the few supremely great writers in the world's history. Although everyone has heard of Goethe (even though they may not have read his masterpiece, *Faust*, and probably cannot pronounce his name), it may surprise many to realize that he was a lawyer by training. Mr. Sears' article sketches Goethe's legal career, an interesting account of a little-known side of a great writer and philosopher.

Around 1800, Johann Wolfgang von Goethe, the German poet whose two hundredth birthday has been celebrated in Aspen, Colorado, this year, prophesied Hitler in these terrifying words:

> *Thus* the Germans should act, in this I am their example: all-receiving and all-giving, with hearts wide open in fruitful admiration, great in intellect and love and spirit—thus they should be, and this is the call upon them; not to grow obdurate as an organization, not to sink into trite self-contemplation or self-glorification, or even in ignorance, ambitious to rule the world. Unhappy nation, for they will not understand themselves, and misunderstanding oneself causes not ridicule alone, it causes the hate of the world and extreme danger. I say to you, fate will abase them because they betrayed themselves and refused to be what they are. That hate and mad, frenzied excess are so dear to them is abominable; that they will credulously surrender to every inflamed scoundrel who appeals to their lowest instincts and encourages their vices is contemptible. Germany is Liberty, universality and love, whether they know it or not.[1]

The man who thus 150 years ago foretold the German tragedy would be worth knowing even if he were not, with Homer, Dante, Shakespeare, among the four or five greatest poets of all time. Goethe is, of course, well known as the author of *Faust*. But few would confess to having read a line of his. This is perhaps due to the lack of truly congenial translations. Only McIntyre, in his recent *Faust* edition, caught something of Goethe's force and charm.

Though Goethe has not managed to sell himself to the American public as a poet, he may yet slip in "through the back door" if Americans learn to view his life as the epitome of fight, efficiency and success. Goethe fought stupidity and intolerance, was a most effective government official and, unbelievable but true, he made good money at it! He became Privy Counselor in Weimar at the age of 26, and there was paid about $4000 a year which, around 1800 in Germany, was a lot of money. Then, Goethe was probably the most widely read and translated author in a hundred years, and he saw to it that he was well paid.

There is amusing proof that Goethe hated to be anybody's sucker. In a case "regarding the complaint of Counselor Goethe against His Majesty's Hosteler Steinert for overcharging said Goethe in his food bill" (1812), three "expert opinions" from other restaurant owners were obtained all of whom thought they could do a little cheaper. Undismayed, Steinert answered: "I cannot reduce my price for I make no money when Counselor Goethe demands special service and will not eat what is on the menu".[2] And the man who, uncompromisingly, had his Faust subdue the Devil did as mortals would in such a case: he settled and paid the bill of eighteen thaler with only a slight discount.

This New-Englandish tightness in personal affairs shows again in his Dealers, like their opponents, may

1. Goethe to Riemer, quoted from *Der Sozialdemokrat*, issue of October 11, 1947 (not available in United States libraries.)

2. *Juristische Wochenschrift* (1932) 854. (Available in the New York University Library and in the library of the University of Chicago.)

draw comfort from Goethe's letter views on government. Fair and New to his friend Knebel (1782):[3]

> I mount up through all classes, I see the peasant wrest from the soil no more than the necessities which yet would do—if he sweated for himself alone. But you know, when the plant-lice on the rosebush suck themselves good and fat and green, then come the ants and suck the filtered juice from their belly. And so it goes, it has come to pass that there is more being consumed at the top in one day than can be made below in a year.

Goethe, the lawyer, speaks of the law's fundamental difficulty when, like Justice Holmes, he complains of the law's (necessarily!) unbending traditionalism:[4]

> All rights and laws are still transmitted
> Like an eternal sickness of the race.

But much of his criticism was really directed against the law as then practiced in Germany—the *usus modernus pandectarum,* that is, the refurbished Roman law of old, and it might perhaps have been less articulate against the Anglo-American type of jurisprudence. One of Goethe's theses submitted to the University of Strasbourg to obtain his master's degree in law, for instance, reads:

> No general Code should be enacted.[5]

This still is essentially the Anglo-American view since our law is still fundamentally formed by courts rather than by statutes.

Goethe heartily disliked the almost irrational trial procedure of his time. In one of his briefs, as a member of the Frankfurt Bar, he castigates his learned opponent:[6]

> Empty principles of undigested procedural rules are patched on where common sense should rule.

In his autobiography he demands "more equity" in court decisions,[7] thereby to some extent demanding this vital branch of our system for continental law, where it is unknown as such (though not in substance).

Lawyers will find little fault with Goethe's appraisal of his brethren of the Bar:

> A barrister in a just cause, a mathematician before the starred sky, each with comprehensive grasp of his subject, are equally god-like.[8]

Like an avenging god, Goethe at times threw daggers at opposing counsel, as for instance in the case of *Heckel* v. *Heckel* where Goethe's trial brief in part reads as follows:[9]

> The mantle of truth is rent everywhere. The more it is stretched on one side to cover up, the more nakedness shows on the other. And since this much-cheered *causa* is nothing but frozen water, the structure on it must sink into an early grave at the littlest, gentlest breeze of spring. What can you expect from such an adversary? Convince him? It is my good fortune that I do not have to. Superhuman powers are needed to make the blind see. And it is for the police to restrain the mad.

The Frankfurt Bar Association strongly disliked such language in trial briefs and formally censured Goethe on April 22, 1772, reprimanding "the unseemly style which must only further embitter the enraged parties to the suit"![10]

Goethe knew of boom and bust, of inflation and deflation long before the terms were coined by economists. He is perhaps the first to suggest (and criticise) the printing press as a means of filling an empty treasury. The Devil in his *Faust* suggests inflation to cure the ebb in the royal purse. Phony money is consequently issued, which is "secured" by the unknown treasures buried in the soil:

> To all to whom this cometh be it known:
> A thousand crowns in gold this note does own.
> It to secure, as certain pledge shall stand
> All buried treasure in the Emperor's land:
> And 't is decreed, perfecting thus the scheme,
> The treasure, soon as raised, shall this redeem.
>
> (Translation: Taylor)

The boom thus produced (Part II, Act I, of *Faust*) ends in a destructive bust (Act IV). If all this sounds quite familiar today, it was nevertheless the insight of sheer genius that saw it 120 years ago.

Goethe also seems the intellectual father of the United States Bureau of Reclamation and of the Valley Authorities. His Faust, after long wanderings and some rather hectic affairs with notorious ladies (Gretchen! Helena!) makes it his life work to retrieve fertile soil from marshy plains and to drain "this stagnant pool" (Part II, Act V):

> To many millions let me furnish soil
> Though not secure, yet free to active toil.
>
> (Translation: Taylor)

Goethe even anticipated the Denver *Post's* "There is no hope for the satisfied man" when, in 1779, he wrote in his diary: "Nothing is more miserable than the comfortable man. . . ."[11]

Goethe then is a poet, statesman, lawyer,[12] who prophesied the German cataclysm 150 years before it happened, a man who wrote the greatest poetry and the soberest analysis of his people. Justly may we apply to him Faust's last words:

> The traces of my earthly days
> Cannot in aeons perish.[13]

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3. *Goethe Kalendar* (1908) 77.
4. *Faust,* Part I, "Student Scene" (Taylor translation).
5. *Juristische Wochenschrift* (1932) 853.
6. *Juristische Wochenschrift* (1932) 829.
7. *Dichtung und Wahrheit* (Book II).
8. *Juristische Wochenschrift* (1932) 830.
9. *Juristische Wochenschrift* (1932) 830.
10. *Juristische Wochenschrift* (1932) 830.
11. Goethe's diary, 1779, reprinted in *Goethe Handbuch I,* 42.
12. Goethe's case files are published in Kriegk, *Kulturbilder aus dem 18. Jahrhundert,* obtainable at Western Reserve University, Cleveland, Ohio.
13. *Faust,* Part II, Act V.

The Arbitrator in Grievance Procedures:

Is Arbitration the Way To Settle Labor Disputes?

by **Theodore R. Iserman** • of the New York Bar (New York)

▪ A new casebook on labor relations prompts Mr. Iserman to an examination of the arbitration system for settling labor disputes. The conclusions he reaches may well give pause to many who advocate compulsory arbitration as the touchstone for ending all our labor-management problems. The article and the book that inspired it deserve the careful attention of the Bar.

▪ A book of more than passing interest, *Cases on Labor Relations,* by Harry Shulman and Neil W. Chamberlain,[1] raises important questions about arbitrating labor disputes. This results not so much from what Messrs. Shulman and Chamberlain say in their limited comments, but from the many examples of what happens when parties to collective agreements arbitrate disputes that arise during their terms.

Rather than *Cases on Labor Relations,* the book might better be called "Cases in Labor Relations".

It consists not of court decisions arising out of collective bargaining, but mostly of awards of arbitrators, umpires, impartial chairmen and other deciders of disputes arising under collective bargaining contracts, in what has come to be regarded as part of the collective bargaining process itself.

Some of the awards cite legal authorities, not always relevant, to bolster the arbitrators' rulings. But most of the awards do not resolve questions of law, or, at any rate, do not resolve them according to legal concepts.

In construing ambiguous language in collective bargaining agreements, as many of the awards do, the deciders sometimes apply the "rules of construction" with which lawyers are familiar, but often in ways with which lawyers are not familiar, seeming at times to use a rule to support a predetermined view rather than to reach a correct result. They also sometimes rely upon the rules when the contract is not ambiguous, and import into contracts, by "implication", "inference", or out of hand, terms the contract does not contain, and "construe" these nonexistent terms; or they rely upon "customs" or "usages" that the law would not recognize as such, or upon "practices" that in law would have no binding effect.

Book Shows What Happens at Arbitrating Stage

What I have said is not intended to detract from the value of the book. It is intended merely to emphasize what the editors themselves say, that the book is not a law book. The book is, rather, a collection of incidents in the process of collective bargaining, and the incidents are well-chosen to show what happens at the arbitrating stage of the process.

In introducing the book, the editors say its purpose

> is to provide concrete illustrations of problems in labor relations to stimulate inquiry as to the nature of the interests and forces involved and the possible methods of dealing with them not merely in arbitration but also prior to and without arbitration.

One might question the value of the book as one providing "concrete illustrations" of what goes on in plants. True, most of the awards contain full statements of facts giving rise to disputes that the awards settle, but the facts are edited once by the interested parties themselves in presenting the dispute to the arbitrator, and again by the arbitrator in showing the grounds for his award. The reader gets them third- or fourth-hand, and it is doubtful whether the awards are a substitute for actual experience in labor relations or for first-hand investigation of the disputes.

What Happens When Bargainers Turn to Arbitrators

The book's chief value is in showing one fact of labor relations, and a highly important one: What hap-

1. Brooklyn, New York: The Foundation Press, Inc. 1949. Price $8.00. Pages 1,255.

pens when collective bargainers, who usually know better than anyone else how a dispute ought to be settled, shift responsibility to someone less favorably situated to make a correct decision?

Its further value is in showing the increasing importance of having a highly skilled draftsman, thoroughly familiar with plant practices and with the peculiarities of labor arbitration, take part in negotiating labor agreements that contemplate arbitrating disputes under them. It is a powerful argument for having highly competent and experienced lawyers, temperamentally fitted for the work, present and active in collective bargaining.

Most of the awards are by outstanding figures in the field of labor arbitration. George W. Taylor, Clarence M. Updegraff, David A. Wolff, Charles O. Gregory, Whitley P. McCoy, Joseph Brandschain, Herbert Blumer, Dudley E. Whiting, Arthur S. Meyer, Saul Wallen, Aaron Horvitz and William E. Simkin are among those who make frequent appearances, and there are 117 awards by Mr. Shulman himself.

The awards appear to be carefully selected. This has the advantage of showing how arbitration works at its best, but the disadvantage of minimizing the oddities one would observe in reading, as they come, an equal number of cases in Labor Arbitration Reports or American Labor Arbitration Awards.

One sees from the book, nevertheless, the extent to which labor arbitration undermines collective bargaining, substituting for it collective litigation, and how bargainers relieve themselves of the responsibility of deciding on what terms to settle disputes when there is another decider to whom they can turn.

Arbitrators Make Decisions Palatable to Both Sides

One sees, also, how arbitrators, all strong believers in arbitrating, further the process, taking great pains to make their awards as palatable as possible to "both sides" (they seem rarely to consider the public's interest in efficiency and increased output), and how they write their awards with an eye particularly to internal union politics. To maintain the appearance of even-handedness, many awards, if not most of them, contain gratuitous criticism of the winner or unwarranted praise for the loser. Thus, in one award (page 437) the arbitrator criticizes the employer severely and at length for not advising the union of an employee's bad work before discharging him, but concludes that the work was so bad as to justify the employer's discharging him "without previous notice of bad work." Again (page 1218), when a union under a union shop contract sought the discharge of two employees because they did more than the union's view of a day's work on important war products, the arbitrator, in denying the union's right to bring about the workers' discharge on this ground, praised highly the people who thus sought to hamper the war effort.

Aim of Enterprise Is Production

The aim of industrial enterprise is, or ought to be, to produce goods efficiently and in great quantities so that more and more people may use and enjoy them at lower and lower prices. But one wonders to what extent arbitration, now so widespread, and the predilections of arbitrators, their unconscious but often clearly recognizable tendency to "balance" awards between employers and unions on a more or less arithmetical basis, pressures of internal union politics, pettifogging, fine word-chopping, involved and tortuous reasoning on simple problems, and theoretic rulings, distort this aim and obstruct it.

We will examine some samples in the middle of the book.

A contract required an employer to notify the union "promptly" in writing after discharging an employee. The employer discharged an employee for stealing, and told the union orally of the discharge, but due to a mix-up, the employer did not give written notice for eight days. No one denied that the employee stole, that the discharge was proper, or that the union knew of the discharge, or claimed that the employer's mistake injured anyone. But the arbitrator rewarded the thief with pay for eight days he did not work (page 445.)

Drinking in Tavern Is Not "Refusal To Work"

An employee left his work without permission, left the plant without a pass and failed to ring his time clock when he left to drink in a nearby tavern. His foreman discharged him. As the arbitrator found, any one of these acts justified discharging the employee, but the arbitrator reinstated him because the foreman, although he listed these offenses in his report, said he fired the man for violating Rule 6, "Insubordination such as refusal to work on the job assigned, etc." The foreman, not being a Philadelphia lawyer, evidently did not realize that leaving the job and going to a tavern was not a "refusal to work" (page 461.)

An employee attacked his foreman, knocked him down and kicked him in the face. The employer suspended him for six days and, after investigating the matter, discharged him. The arbitrator rewarded him with pay for the six days he was suspended before the employer notified him that he was fired. Nothing in the contract required sooner notice (page 464.)

A large employer discharged an employee for misconduct. A year later the employee got a job at another plant of the employer, representing that he never before had worked for the employer. Upon discovering the falsehood, the employer discharged him again. The arbitrator conceded that the employer had the right to discharge an employee for cause, and that falsifying an application for employment was cause. He conceded, also, that the contract did "not provide any period of limitation upon the offense here involved". But he in effect wrote such a clause into the contract, saying the

employer had to discover the employee's fraud within one year or lose his right to discharge for that cause, and he reinstated the employee (page 466.)

Arbitrators Confuse Civil with Criminal Law

Although the relation between employer and employee is purely contractual, more and more arbitrators, with that little knowledge that in law as elsewhere may be a dangerous thing, confuse criminal with civil law. Typical of a number of arbitrators, one holds that "one accused of a misdeed" (here the civil one of breaking a contract of employment) must be shown to have performed the act "with criminal intent", and on top of this blunder he piles another, saying the employee can be discharged only if the evidence shows "beyond a reasonable doubt" that he is guilty (page 468.) Although the rule against self-incrimination applies only in criminal matters, another arbitrator finds that an employee's "constitutional rights" were invaded when, at the employer's request, she disclosed that she was carrying a dangerous weapon, contrary to a plant rule (page 511.)

An employee claimed that his work on a labor-management war production committee took all of his time out of the plant, for which the employer, although protesting that the time was excessive, paid him. When the employer found the employee had been running a private business and taking flying lessons, not attending to committee affairs, it discharged him. The arbitrator held that the employer's permitting the employee to take excessive time purportedly to engage in committee work "estopped" it from discharging him when it found he had lied about what he was doing (page 403.)

The foregoing samples, all taken from the chapter on "Discipline", have their counterparts in other chapters, dealing with various aspects of producing goods efficiently, or trying to. When carefully-chosen expert arbitrators make such awards as these with collective agreements to guide them, the reluctance of employers and unions to submit the terms of contracts to arbitrators not of their own choosing is understandable. Happily, for each ruling of this kind, there often is another in the book that is forthright and realistic, but the ratio of strained results nevertheless seems high.

Views of Arbitrators Are Discussed

The oddities that appear, aside from those attributable to ordinary accidents of litigation, seem to arise for the most part from one or the other of three views that a large number of arbitrators, but not all of them, appear to hold in common:

1. Notwithstanding the almost universal, if not inevitable, conflict between the interests and objects of unions and their leaders (as distinguished from the employees themselves) on the one hand, and of employers and their managers, on the other, many arbitrators hold to the view that unions and employers are "partners" in the enterprise and run it "jointly". Interests of employers and employees in many ways are joint and mutual, and in theory those of unions and employers could be too. But in practice, most unions, bedeviled as they are by internal union politics and by rivalries among their leaders and with other unions, thrive on creating real or fictitious conflicts between employees and their employers, even in those areas where their interests are or ought to be mutual, and use the "conflicts" to attract and hold members. It certainly is true that unions could best serve their members and at the same time all our people, by coöperating with employers to increase output and reduce costs, making more goods available to more people at lower prices. And our history shows that the unions' members, as well as enjoying the lower prices, could share in the employers' savings in costs in the form of higher wages.

Unions could likewise serve their members and the public by promoting competition among employers, or at least not trying to stifle it, as more and more of them are doing now.

Theodore R. Iserman is a native of Kansas. After graduating from the University of Chicago Law School in 1926, he practiced in France and, since 1928, he has practiced in New York City. A student of labor law, he is the author of *Industrial Peace and the Wagner Act* (1947).

But assuming a state of affairs does not make it so. And arbitrators who regard as a partner in the business a union that thrives on turmoil, that for purposes of organization or of internal union politics constantly abuses and vilifies the employer and opposes every change in the business, no matter how socially desirable, greatly impede our progress toward a better economy.

2. Notwithstanding its one hundred years, many arbitrators take the view that the labor movement has not yet "come of age", that allowances therefore must be made for unions and their members, even when their delinquencies are willful and deliberate, and that their derelictions must be treated with indulgence. This attitude encourages misconduct, subverts the aims of collective agreements and undermines output.

How differently arbitrators regard mistakes of employers! They hold employers to extremely high standards, insisting upon perfection in them, allowing them no mistakes and imposing heavy penalties upon them when they or their foremen or other agents, even in complete good faith,

make a mistake, harmless though it may be, like failing for a short while to give written as well as oral notice to the union of the discharge of an employee concededly guilty of stealing.

When a foreman, as the result of even a "careful mistake", lays off one employee instead of another with less seniority, or if he sends a man home for misconduct, the employer enjoys no "unjust enrichment" or other benefit; he pays someone for the work that is done. Nor can it be assumed out of hand that the correct measure of damages for the employee who was laid off or sent home is the wages he did not receive. Loafing or resting at home, or fishing or hunting surely is not worth the same rate of pay as attending at the shop and doing the assigned work. If the man does some chores or attends to personal affairs, the time off may have benefited him. Yet arbitrators almost invariably grant him full pay, requiring the employer to pay twice for work that was done only once.

The thing has gone so far that arbitrators not only hold employers responsible for their own mistakes, but hold them responsible also for mistakes of their employees, and penalize the employer, not the employee, for those of the employee. The theory seems to be that when an employee violates the labor agreement or otherwise misbehaves, it is because the employer erred in hiring him in the first place, or was too tolerant of his earlier shortcomings, or did not train him properly, and is therefore at fault. However justifiable this kind of thinking may be on other grounds, there can be no gainsaying the fact that it keeps in the plants many employees who ought not to be there, to the detriment of output and our industrial goal.

3. Another view that many labor arbitrators have in common is that they have much greater latitude in interpreting and applying collective agreements than other deciders enjoy, even in interpreting other kinds of agreements. Messrs. Shulman and Chamberlain advance this view at pages 5, 6 and 7 of their introduction. There, after describing the give and take and compromise of collective bargaining, they show that the process carries over into collective litigation, only now with the arbitrator doing the giving, taking and compromising. Their view seems to be that arbitration ought not to involve merely "the simple alternative of judgment for the plaintiff or defendant," but should admit "possibilities of intermediate adjustments which [in the view of the particular arbitrator] might be more appropriate and helpful", not circumscribed by "limitations from the law".

An arbitrator's making "intermediate adjustments" may be justifiable when he is deciding what the terms of a collective agreement shall be. Then he may take into consideration what settlement, in his judgment, would result if the union struck, that is to say, the terms on which the parties eventually would agree.

But when the terms of an existing agreement come before him, the parties presumably, in the steps of the grievance procedure, already have exhausted the possibility of intermediate adjustment, and there is ground for thinking that the facts of the case and the terms of the contract ought to govern the arbitrator's award.

The course the editors recommend produces uncertainty in the minds of the parties to the contract, gives rise to new disputes and brings about less bargaining and more litigating, an end that benefits only the arbitrators.

Arbitrators can adopt the "simple alternative" that the editors deplore, without interjecting their own notions as to what the bargaining should have produced or as to what the contract would have said *if* it had covered the particular point, and still retain the confidence and respect of employers and unions. This is evident from the success that a considerable number, although probably in the minority, have enjoyed by doing so. Their awards in this collection contrast sharply with those of their more theoretic colleagues.

> THERE IS moreover something in the very function of the lawyer that tends to make him conceited and contentious. Being called upon so frequently to instruct the ignorant and direct the doubtful, he comes in time to be wise in his own conceit and takes on the airs of Sir Oracle. He becomes didactic; he declaims. Being so often the champion of the accused and the advocate of mooted measures, he develops an adversary attitude. Beginning with pride in his profession, he develops pride in his position, and stands like a zealous sentry at the gate of his life's citadel, quick in its praise and determined in its defense. Above all a good sentry must be alert and responsive, and always sensitive to the danger of attack.
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> —WILKIN, *The Eternal Lawyer—A Legal Biography of Cicero*, page 112.

Law Students and the Law:

"Experience-Employment" in Legal Education

by **Bertram S. Silver** • of the California Bar (San Francisco)

Upon his graduation from law school into the rough-and-tumble world of the practicing lawyer, every young attorney faces the problem of acquiring the experience necessary to make him a capable counsellor and advocate. Such experience cannot be gained in the law classroom. Mr. Silver proposes that the law student work during the summer in a law office as part of his legal education, thus gaining at least some practical experience before he is admitted to the Bar. While this article will be of particular interest to law students and law teachers, the lawyer in practice will find in it a suggestion of how he can assist young lawyers in their struggle to establish themselves in an old and honorable profession.

The encouragement of summer "experience-employment" for the struggling law student would result in a neophyte lawyer better equipped to practice law. I speak as a lawyer in practice for only two years. I speak as a member of the Bar attempting to make a transition from a graduate law student to a capable legal adviser. I am a lawyer and not an educator. Yet I have the temptation to support (not suggest) a plan whereby the struggling law student could mix six parts of academic research with one part of practical experience. This plan, stripped of all of the niceties of fancy verbiage, is to encourage the law student to gain at least a modicum of practical experience *during* his period of legal theorizing rather than *after* such period. As a corollary, the bar associations and the law schools should sponsor the plan in order to influence lawyers, as a public service, to provide "clinical" facilities.

That this problem is not new is attested by frequent articles on the subject of, "How best to prepare a law student for his career". Law schools have committees analyzing, developing and arranging new programs to better equip the future attorney with "tools" to aid him after graduation. There recently appeared in the students' paper of a prominent law school an article entitled, "Few Vacation Jobs Open this Summer with Law Offices". A perusal of the article indicated that:

> 1. The placement office reported little concrete success in locating definite summer openings for students.
> 2. Most offices that accepted summer employment did this as an accommodation to the individual student who appeared seeking such a position.
> 3. Many offices and lawyers questioned the merits of summer employment.

Although not advocating summer "experience-employment", Dean Lowell S. Nicholson of Northeastern University School of Law recognized the deficiencies now contained in the law schools under the usual program (*Mass. Bar Bull.*, April, 1949). He obliquely recognized the deficiencies of the graduate law student. In that article Dean Nicholson stated:

> Law schools are on the defensive for their failure to do anything effective to bring legal education in law schools closer to actual practice in law offices. The transition from law in books to law in action is a drastic one.

The moot court arguments, term papers, law review work, or other devices encouraged by the academicians are, of course, of a certain amount of aid. But they are not the whole answer; they are not only limited in scope and number of students that can participate, but they lack the one practical factor needed, *i.e., actual experience.*

Only Cure for Inexperience Is Actual Practice

The "sickness" has thus been diagnosed by numerous "physicians" of the legal profession. The "cure" has been expounded by countless more. I believe, however, that each of these remedies suggested lacks the one essential element that has caused the "sickness" to occur. It is too obvious for explanation that the only cure for inexperience is *actual practice* in the field of law. The purpose of this article is merely to point out that

the future lawyer would do better to gain this experience—even of a limited amount—before graduating from law school. The law schools would profit by encouraging this program.

Sometime ago, in an informal discussion, several younger members of the Bar reviewed this problem. A certain amount of canvassing for the opinion of other lawyers was attempted and upon such investigation and further discussion, the initial group came to the conclusion that law students would profit immensely by a practical contact in a law office *sometime before completing their academic studies.* We were not unmindful of the difficulties presented, nor of the disadvantages that would accrue from such a short employment period. (The suggestion was even advanced that each student should pursue such employment, as part of the law school curriculum, for one year; such requirement would, of course, lengthen the course considerably and was therefore decided not to be practical.) But it was candidly felt by the group that such difficulties and disadvantages were greatly outweighed by the benefits and experience that would accrue from combining actual legal contact with theoretical academic studies. The maintenance of a high standard by a law school could be furthered by the encouragement of a practical approach to the legal problems that would be faced by the future attorneys.

The program should consist of the following procedure:

(a) Students at the end of their first or second year should be encouraged to find "experience-employment" for the summer months with an active practitioner.

(b) Such employment would ordinarily be on a nonpaying basis for several reasons.

(c) Certain credit should be given by the law school for such "experience-employment".

A. Every graduate student who has entered actively into actual practice suddenly realizes his shortcomings; the ability to solve clients' practical and mundane problems is no easy task even to an experienced lawyer. To the neophyte, the sudden confrontation of such practical legal matters comes as a brutal realization to him of his inadequacy. The old adage, "Experience is the best teacher," is entirely correct in this situation. The experience, it may be felt, can be gained after graduation as well as before graduation, or vice versa. But this assumes that the experience will be of equal value.

Analyzing Legal Issues Should Be Part of Training

It is submitted, however, that a confrontation with clients' actual problems sometime during law school will be of more value than to delay such contact. It is not contended that the factual or legal solutions in any one particular case will be of great value; rather, it is submitted that the general contact will forcefully bring to the student a realization that a lawyer's job is not limited to the analysis of legal problems. It is, instead, a process of (1) analyzing the legal problems involved, and (2) a practical solution based upon such analysis. The utilization of the process of analyzing the legal issues is a component part of formulating a practical solution to the problem.

Thus, a lawyer's duties consist not only of the analysis of legal problems, but of meeting, contacting and talking to clients. He hears, and is expected to elicit, facts of a particular problem. The problems are not presented in "casebook" form. The formation of a corporation is not an accomplished fact, but, rather, the attorney is called upon to prepare the articles, by-laws, minutes and other practical steps that necessarily must occur before your casebook problems can arise. On frequent occasions, the lawyer must prepare a case for trial. Gathering evidence, depositions, trial briefs, and the legal basis of his case are all a part of the multitudinous problems faced in one case.

It should be noted that law is the only profession wherein the trainee is not accorded some practical foundation before he is "turned loose on our society". After successfully passing the bar examination (which consists of more theoretical "boning up"). he is in effect told, "You are now a full-fledged, accomplished lawyer." Only if his common sense admonishes him as to his inadequacy, will he not be in for a rude awakening. Contrast this to a physician's internship or a dentist's clinical experience. Compare the "attorney neophyte" with a certified public accountant who has, in most cases, spent years before gaining his certificate. I believe that if the student were to gain some experience in the office before he has completed his law school studies, he would acquire greater insight in analyzing the problems thereafter presented during the academic tenure. His analysis would be tempered with a practical approach. He would, in the balance of his academic training, subconsciously approach the legal issues with practical skepticism instead of academic theory. This approach would more surely aid the student in grasping the significance of his problem. His problem would no longer be associated with abstract theories or extreme probabilities, but instead, he would attack it with a certain sense of practical imminence. An office association, even for a short period, would instill in the student the subconscious realization that the problems faced in law school are "real and live issues". If this contention is sound, the student would more readily retain the knowledge he has acquired.

Experience Should Come at Time Student Chooses

The choice should be left to the student as to whether such experience should be gained at the end of the first year or at the end of the second year. If it were the former, then the practical experience would and could be put to use for a longer period during his law school training. If it were the latter, he would be of more value to the firm as he would have the "legal approach" of twelve basic subjects. Each argument has merit.

B. The startling innovation that

a prospective lawyer should work for no compensation may strike the average student as not only being erroneous, but also a "harebrained assumption". There are several things, however, to be said in defense of this position.

The very reason for the presently advocated proposal indicates that there would be no injustice in requesting the student to spend his time without compensation. It has never been suggested that the student should be paid for the time spent at his academic pursuits while within the cloistered walls of the law school. The basic reason for suggesting an "experience-employment" period is to add to the students' knowledge certain fundamental precepts of "practical law". (The intern receives little or no compensation for one year or more.) The fact that this knowledge is not gained within the school itself does not lessen the purposes for which it is intended. This addition should, and must, be taken by the student in the same attitude of conventional education that embraces the general sphere of "educational advantages". It should be made apparent to the student that he is not to be paid on the basis of what he can accomplish to the advantage of his "employer". Rather, he is to be encouraged to accomplish only for the sake of learning the practical mode of transacting an attorney's business. It is axiomatic that in accomplishing the latter he must of necessity be of some advantage to the firm. But this consideration should be secondary.

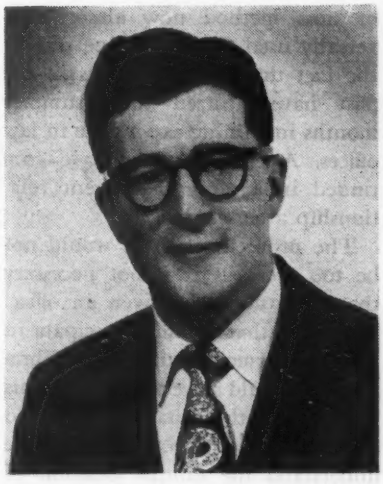
Older Lawyers Would Give More Time to Juniors

If the association should be formed without compensation, I feel that the immediate supervisor of the student would more readily be willing to spend time with the neophyte in the development of cases. He would understand the position of the student, and in exchange for the time spent by the student would be more willing and able to act as a guide and adviser with little or no personal loss. This would directly contrast with a too prevalent practice of some firms of saying, in effect, "We are paying you—now go out and find it yourself." This attitude is not a conscious nor preconceived one, I admit, but the employer-employee relationship in a good number of cases lends greater impetus to its occurrence. The above suggestion, therefore, is made in an attempt to discourage such a feeling and place such a suggested practice on an entirely different level.

It must also be remembered that in any new association, formed after a student graduates from law school, the student is often paid very small wages. One of the reasons for this is obvious. His knowledge of "practical law" is limited, and, therefore, the aid he can be to the firm is likewise limited. (This is reflected by the fact that a trained legal secretary can command a higher salary than most graduate students or first-year lawyers.) I am not suggesting that the student enter into this "no-pay" relationship on the possibility that he will reap greater reward when he graduates. But I believe that the tendency to pay lower wages to the newcomer will lessen if he has had some experience in a law office. It is generally conceded by attorneys that for the first few months a "first-year lawyer" adds little to the well-being of a firm (except perhaps comedy). If this is true, then the time could best be spent where it would do the student some good and not at the expense of a firm.

It must be acknowledged that the law firm is willing to pay a recent graduate a salary (even though small) because it is looking to the near future; it is an investment in a future associate at the expense of the firm. An experience-employment relationship during the summer months must of necessity be temporary in many cases. The firms generally would not look at it from a long term standpoint and could not be expected to pay even a beginner's salary. The student is adding little to the advancement of the office and should expect the *quid pro quo*.

Another consideration will be that firms will be more apt to be receptive to taking these students. It is very true that work may drop off during the summer months. Yet, there is always some type of activity in which the student could gainfully occupy his time. Research into actual problems that are to come to trial in the future, depositions, sitting in on interviews with new clients, preparation of trial briefs, etc.! The firms will be less likely to refuse employment as there is not the immediate problem of making an important decision as to a long time association. This would be an opportunity to the firms to get acquainted with future members of the Bar and give both parties time to make a decision as to its permanence. Should a particular arrangement not prove satisfactory, there would be no necessity to renew it after the student's graduation. If the arrangement is satisfactory to each party, it paves the way for a future association, and the neophyte's initial period of probation is not one of doubt as to his satisfactoriness. The proposal offers a far better method of forming semi-permanent office associations than the usual hit



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or miss method now almost universally used. This is borne out by the fact that many students in the past have utilized their summer months in gaining experience in law offices. A good number have continued in a more permanent relationship after graduation.

The problem of space would not be too great as it is not necessary that the student be given an office. The firms that would participate in this arrangement usually have libraries that would serve well during this period; and the usual objections to such use would be obviated when we understand the unique position of the student.

Plan Should Have Further Study

C. It is obvious that the proposed "experience-employment" plan is open to further study. Should academic credit be given the students for such time spent? If so, how much? Should the plan be compulsory for all students? Some credit should be given the students if the undertaking were not made compulsory. For it is logical that if the plan has merit in the practical advancement to the student, then he should be given an incentive to attempt it. If he succeeds, he should be put in a position which rewards him for his efforts. In many law schools a thesis or third-term paper is required from each student (law review members excluded). It perhaps could be arranged that such practical experience would be in lieu of that requirement. Or perhaps credit equivalent to one third-year subject would be allowed; this would allow the student greater freedom in his last year to balance the greater time he has put in prior to that.

D. A necessary requisite for the success of the plan is the wholehearted cooperation of the bar associations and law schools. These organizations must endeavor to make the individual and firm members of the legal profession realize that it is to their ultimate advantage to participate. For, without the sincere cooperation of the legal profession, the plan would be doomed to failure.

I advocate this plan of "experience-employment" not as a destructive critic but rather to show what I feel to be the best possible measure of relief to the student and the profession in regard to an existing defect. I encourage the plan not as an abstract or passive remedy, but rather as a dynamic and active mode of improving the "species of the breed".

It is seldom that the student's father is an active practitioner (or a good client of the office). Most firms would hesitate to assume the task of indoctrinating a student into the myriad practices of everyday law. But the firm (if there be even one) which agrees that the above plan would be of value cannot be allowed to find innumerable reasons (or excuses) for excepting itself from active participation. Each individual attorney should be made to feel that he or she should become part of the program to provide these "clinical" facilities as a public service. If the law schools and bar associations actively encourage the idea the attorney or firm will not be apt to make an excuse for nonparticipation.

The "clinical" facilities are necessary. Only the practicing members of the profession can provide them. It would entail no cost and little effort. If the "experience-employment" plan has merit, the attorneys should actively participate.

The above exposition of an old proposal cannot be taken as a final solution. It is merely a suggested plan to aid future students. It is felt that the encouragement of "experience-employment" as above outlined, will be of invaluable aid to students in better understanding (1) the actual practice of law, and (2) the application of those theoretical concepts gained while in academic training. It is believed that the evolution of the plan will show that students utilizing it will learn to correlate the practical and theoretical problems *while in law school.*

The more obvious objections to the plan would, of course, have to be eliminated or minimized. But it is submitted that the merits of the basic idea, above proposed, far outweigh its disadvantages. It is further submitted that the law schools and bar associations which encourage and more fully formulate the above plan will reap a greater reward; the students who accept the benefits of the above plan will more clearly attack the theoretical problems presented, because they will have a practical basis upon which to rely. Despite the fact that the "experience-employment" period can only be for two to three months, despite the limited office space, and despite the lighter summer work, the law school should adopt an active and intensive program of encouraging students and law firms to enter into summer associations. If the law schools, bar associations and members of the profession will support such a proposal, they will be taking a step forward in a worthwhile and advantageous innovation.

The Organization of the Bar in England:

A Sidelight on English Law

by **Derrick Bass** • of Hertfordshire, England

▪ Bar associations such as we have in the United States are unknown in England, but the English Bar is nonetheless highly organized. The legal profession is composed of two groups, barristers and solicitors, and the privileges and duties of each are determined by statute, custom and the rules of the Law Society and the Inns of Court. Mr. Bass describes this elaborate organization in this interesting article.

▪ The various articles that have appeared in this country about English law do not seem to have touched on what is, perhaps, as integral a part of British law as the Constitution is of the law of the United States. This is the organization and personnel of the English Bar.

The Bar in England is divided into two completely clear cut portions –barristers (or advocates) and solicitors (or attorneys). American law firms are usually divided on these lines, but it will be seen shortly how even more completely divorced are the two branches in England.

A barrister starts first by applying for admission to one of the Inns of Court. It is not proposed in this article to write on these institutions, of which some very good histories have been published; they are teaching, disciplinary and social bodies to which a barrister must belong. In order to secure admission, the candidate has to sign a declaration that he is a British subject and is not a member of or connected with any firm of solicitors, nor is he an accountant, auditor or connected in various ways with local government bodies. He has to have matriculated at a recognized university, and must have passed an examination in Latin of matriculation standard. His training is not undertaken directly by his Inn, but by the Council for Legal Education, a body formed by the various Inns and the Bar Council. In his Inn he "eats dinners"—that is, he attends a certain number of times in each law term, eats a very good dinner and meets students, barristers and judges who give him some idea of the traditions and duties surrounding him in his future life.

His actual technical education as a barrister is undertaken either by the university of which he is a member or, if he does not belong to a university, by lecturers appointed by the Council for Legal Education. If he so desires, he can study entirely on his own without attending any lectures, in which case the Council will advise him and guide him in his reading.

After he has kept twelve terms, he is called to the Bar. The declaration that he has made on entry is reaffirmed, but this time on oath in the form of an affidavit. If the Inn is satisfied that the candidate has passed his law examinations, has truthfully sworn the affidavit and is in every other way a fit person to be called, he is duly called, and is thereafter free to plead before any court in the Kingdom.

A solicitor is not called but "admitted". He serves an apprenticeship as an articled clerk to a solicitor, attends certain lectures, passes his examinations and then, provided that he produces unimpeachable references as to character, he is admitted by the Law Society. He is entitled to plead before County and Petty Sessional Courts and, in some counties, before Quarter Sessions.

Barrister Is Strictly Bound by Statute and Custom

A barrister, after call, is bound very strictly by certain acts of Parliament, by certain regulations of the Bar Council and by the inviolate *lex non scripta* of his profession. He may not advertise in any way—even having his name in an alphabetical list of barristers in a trade directory is prohibited—and he may not enter a solicitor's office except for the purpose of transacting his own personal and private business not connected with his practice. He may not receive instructions from anyone other than a solicitor or another barrister and he usual-

ly does not interview a client alone.

The most important part of the restrictions placed upon a barrister are those of custom. For example, by custom, he never, under any circumstances, discusses fees with a client, lay or professional. A barrister has a clerk who is charged with the duty of attending to all his master's business. A solicitor, wishing to brief a particular counsel, addresses himself not to the counsel but to his clerk. The clerk ascertains that his master is able to take the brief, and, if he is, himself decides what fee to mark upon it. The clerk is completely the business man in the barrister's chambers, leaving the barrister free to attend to the one thing he is there for—the interests of his clients. The clerk is paid a small salary by his master, but the major part of his income is derived from fees, because he is paid a fee by the client proportionate to the sum marked on his master's brief.

Many Barristers Never Appear in Court

A barrister is not confined to pleading, but is often consulted when a difficult piece of conveyancing or drafting is to be done. Many barristers specialize in this work, and some of the cleverest barristers are those who never appear in court at all, but who do all their work in chambers.

A small detail worth noting is that a barrister does not have an office, but "chambers". Equally, it is impossible for barristers to belong to a firm or partnership, because a brief or a reputation is entirely personal to the barrister instructed. A practice, therefore, cannot be sold.

Every care is taken in English law to see that a barrister not only is incorruptible, but is free from the slightest suspicion of corruption. For example, unlike a solicitor, he never has charge of trust money. His fee is payable whether he wins or loses, and he therefore has no special incentive to win, apart from his natural pride in his work. Any form of speculative action where counsel is paid a high fee if he wins but a low fee if he loses is strictly prohibited. A very poor man bringing suit against a wealthy corporation cannot give his counsel a brief at, say, five hundred guineas, it being understood that nothing will be payable unless he wins. If the barrister, out of the kindness of his heart, accepts the brief at a nominal fee, it matters not whether he wins or loses, because the corporation will still be liable to pay only the same fee as the poor client.

Word of Barrister Is Never Questioned

It is an accepted maxim of the courts that a barrister's word is unimpeachable. If, in court, a barrister is asked to produce a certain document that is inimicable to his client's case, nobody would doubt him for one moment were he to deny any knowledge of the existence of such a document. Any form of obstructionism or trickery is regarded as being out of the question in a barrister, and nobody in England would ever, even mentally, accuse a barrister of such practices.

A barrister is not answerable to any client for his actions. He cannot sue for his fees (but in theory, at least, they are paid in advance), and he cannot be sued for malpractice. A solicitor is able to sue and to be sued, and, as he is the one who pays the barrister, not the lay client, he might be inclined to sue the lay client should he not pay the fee. Sometimes, to protect his reputation, a solicitor will pay a barrister's fee out of his own pocket should he not be able to recover from the lay client, because barristers are usually unwilling to accept briefs from solicitors who gain a reputation of not paying the fees.

Disciplinary control of barristers is exercised very strictly by the Bar Council, of which the president is the Lord Chancellor. A barrister can be charged before the Bar Council with violating any of the laws, rules or customs affecting his profession or with any other offense that is deemed to be out of keeping with the dignity and honor of the Bar. Should he be convicted, he would be liable to expulsion from the Bar, and, in fact, the Bar Council would not hesitate to strike off any member of the Bar who might bring it into the slightest malrespect.

Derrick Bass is a schoolmaster at a preparatory school in Hertfordshire. During the war, he served in the Royal Air Force, where he defended numerous courts-martial cases. He is the author of *The Junior Officer's Guide to Military Law*, shortly to be published in England. His interest in the law dates from his reading Marjoribank's biography of Marshall Hall.

After a barrister has had at least ten years' service at the Bar and has made a name for himself, he can apply to the Lord Chancellor for "permission to wear a silk gown". If this is granted the barrister becomes a King's Counsel, wears a silk gown in court (whence comes the expression "to take silk"), wears a full-bottomed wig on state occasions and is entitled to put the letters "K. C." after his name.

King's Counsels are usually referred to as leaders, and other barristers as juniors. A leader, of course, commands a far higher fee than a junior, but taking silk is on occasion a grave disadvantage. A good junior, with plenty of county court work (at perhaps ten guineas a case) and with plenty of undefended divorce petitions (at about five or ten guineas a case, each case lasting about five minutes) will almost certainly earn far more than any but the most efficient leader. To start with, a leader's

fee is far higher than a junior's, and so he will not be briefed unless he is really worth it, and unless the case is sufficiently difficult to make it necessary. He is not likely, therefore, to be briefed in the very remunerative undefended cases. In addition, he must have briefed with him a junior counsel, who must be paid a fee equivalent to two-thirds of that paid to his leader. This drives up the cost of such litigation greatly, and tends even more to drive people away from leaders.

It should be pointed out, however, that even these rules make litigation in England considerably less expensive than litigation in the United States. A leader such as Sir Patrick Hastings or the late Sir Edward Marshall Hall would not be likely ever to have a brief marked at as much as a thousand guineas — though occasional cases of very high fees have been known—as compared with frequent briefs at ten, twenty or even thirty thousand dollars that are met with in this country.

Rules Governing Solicitors Are Set by Law Society

A solicitor's fees are set by act of Parliament, and any client who thinks that he has been overcharged by his solicitor is at liberty to apply to his local county court for taxation of costs. This is rare, because solicitors usually reduce their fees (except in litigation) for their clients. A solicitor is bound by very strict rules in the same way as a barrister. He is not allowed to advertise, but he is allowed to have his name in alphabetical lists in directories. He is compelled to keep two bank accounts, one for his firm and one for clients' trust money, and he must annually submit accounts to the Law Society. He alone is authorized to draft conveyances, and the Law Society do not hesitate to prosecute in cases where any other person usurps this right. Solicitors are frequently banded in firms, but are very rarely incorporated as limited companies. A solicitor's practice can be sold, and, if it is, it usually retains the same name. It is a standing joke in England that in a firm called, for example, Smith, Jones, Brown and Smith, the partners are liable to be, say, Mr. White, Mr. Green and Mr. Robinson!

Disciplinary control of solicitors is exercised by the Law Society, and any solicitor convicted by them of irregular practice would be "struck off".

These restrictive rules are accepted cheerfully by the legal profession in England, because it is realized that in this way, and in this way only, can the absolute integrity of the English Bar be upheld, and in this way only can the Bar be worthy of the high trust placed in it by the lay public in England.

The Willing Collegian Who Was Hunting for a Foothold

▪ Once there was a Young Man with a College Education, an assortment of Cravats, and about $8 in Real Money who was anxiously looking for his Life Work.

He wanted to break into a Learned Profession so that he could wear his Good Clothes all of the Time and get the Coin without working too hard for it.

His Idea of a dignified Snap was to sit in a small Office about three hours every Day and have the Public come in and pass Money to him.

* * *

. . . the Collegian bethought him of the Law. So he went to old Judge Caveat and said he wanted to start right in Reading.

"If you can dispense with Eating for the next 15 Years, come and join our noble Profession," said the Judge. "If you have got into the Food Habit, however, and feel that you may need Clothes now and then, take my Advice and duck. It's getting so that one can't drop a Brick out of a Window without hitting at least three Lawyers. The only ones who land are those that sell their Immortal Souls to the Corporations, and they get roasted so hard that they can't be elected anything except United States Senators. The Legal Profession is a Lottery in which there are 999 Blanks to every Prize, and the one who gets the Prize usually draws a case of Nervous Dyspepsia with it and has to live on Cereal Food. If you desire safe and profitable Employment, learn to be a Bank-Robber, but don't join the Starvation Brigade. The Professions are petering out. We live in a Commercial Age. The Money-Makers of today are the Wise Boys who trade in Produce and Manufactured Staples."

* * *

"There doesn't seem to be any safe Opening for an eager Soul with a University Training," said the Graduate.

"I might give you a Hunch on the Q.T.," said the Old Gentleman. "Those who are very Bright often marry into the families of the vulgar Rich, thus acquiring the Means to go Abroad and study Art and, at the same time, throw the Hooks into their Native Land."

"I'll tackle Matrimony," said the Collegian. "That appears to be the only Field that is not overcrowded."

MORAL: Every Man knocks his own Line of Work and sticks to it like Glue.

Breaking into Society,
by George Ade (New York: Harper and Brothers, 1904).

"Books for Lawyers"

FOUNDATIONS FOR WORLD ORDER. *By E. L. Woodward, J. Robert Oppenheimer, E. H. Carr, William E. Rappard, Robert M. Hutchins, Francis B. Sayre, Edward M. Earle. Denver: The University of Denver Press. 1949. $3.00. Pages 174.*

On the occasion of the twentieth anniversary of the Social Science Foundation of the University of Denver there was a series of addresses on the "Foundations for World Order" by a notable assemblage of thinkers on that subject. Unlike so many such symposia which become thin reading on the printed page, this volume fortunately preserves rich food for thought even if some of the courses are not up to the rest of the menu.

E. L. Woodward, Professor of History in Worcester College, Oxford, begins the discussion with an examination of the historical and political foundations for world order. As to what many would consider obvious, the necessity for a world order in which international war is impossible, Woodward explains:

> An agricultural society can survive vast calamities of war, pestilence, and famine. Our machine-ruled community has no such resilience. It is near enough now to the point at which recovery is impossible; the million million delicate-spun threads cannot bear any greater strain. If the web is broken, it cannot be mended.[1]

What is required is to build on the political and moral tradition of the West, the tradition which includes the Roman Empire, the Holy Roman Empire of the Middle Ages and the Concert of Europe of the nineteenth century, and on the basis of these brave beginnings to try to fashion a still larger polity than the West has ever known. The difficulty of attaining a world order lies not only in the attitude of the Politburo in the Soviet Union but, according to Woodward, even more so in the antagonism between the West and the utterly diverse East.[2]

Without attempting to prescribe a policy, which after all is properly a function of the politician rather than the historian, Woodward suggests that ". . . given the present pathological state of world opinion, I should not begin by putting the strongest emphasis upon disarmament". Instead we might ". . . look at our charters and codes of international relations much as we look at the code of driving on our public highways . . ."[3] "If we cease to assume that our arrangements for world order must be awe-inspiring, vast in scale and impressive to the eye, we may find it easier to develop a loosely contrived structure and the simple general rules which are all we really need".[4]

From J. Robert Oppenheimer, the theoretical physicist chosen by the War Department to devise the Bomb itself at Los Alamos, comes a discussion of the scientific foundations for world order. Reasoning in tight, unassailable propositions, Oppenheimer shows that

> The advance of technology has altered the character of war and has made its elimination a pressing need, and has raised, far before the time when the world was politically ripe for it, the question of world order.[5]

Technology, which has made war unendurable, has also established a commonly agreed standard of what men want. Russians as well as Americans, after all, want the high standard of living for all men which technology alone can supply. Without overstressing it, Oppenheimer also mentions the marvelous fraternity of men of science which gives them a common intellectual language—as long as they discuss science alone.

After reasserting his belief in the plan of the majority of the United Nations for the control of atomic energy, Oppenheimer concludes with his own statement of the problem of world order:

> It is to discover with all the ingenuity, all the skill, and all the fortitude we possess, those areas which we have in common with the peoples of the world everywhere, to realize that in those areas reason can apply, because we are talking about things of common knowledge and common experience. What I have been trying to say here is that among these things is science.[6]

When it comes to the moral foundations for world order, E. H. Carr, former diplomat and professor at the University College of Wales, clearly has a well-nigh hopeless task. If, as he says, "no effective world order can be built on a denial of moral principles already accepted by an overwhelmingly preponderant part of the civilized world,"[7] how can the three problems he poses, of discrimination between individuals, of inequality between political units and that of the base of power be solved? Recognizing that the moral diversities of mankind cannot possibly be dealt with definitively within the few years left for establishing a world order, Carr wisely limits his recommendation to one put forward already by Oppenheimer. Simply to lay the moral foundations for world order we can strive to satisfy the basic need of all men for minimal living standards, not through a foolhardy dispersal of accumulated wealth or through political giving.

1. Page 23.
2. An answer has been submitted by F. S. C. Northrop in *The Meeting of East and West* (N. Y. 1946).
3. Page 32.
4. Page 33.
5. Page 42
6. Page 61.
7. Page 71.

Marshall-wise, but what Carr calls ". . . an extension of orderly economic planning from the national to the international sphere, the first steps toward an international coordination if not an international pooling, of resources on broader lines than those of national sovereignty or political affiliation".[8]

Unfortunately William E. Rappard's remarks on economic foundations for world order fail to develop Carr's proposal or to throw much light, economic or otherwise. The summary by Francis B. Sayre of the program of the United Nations for trusteeship over some of the colonial areas of the world is of interest but not precisely relevant to the theme of the symposium.

Edward M. Earle, the distinguished scholar of national power at the Institute for Advanced Study at Princeton, discusses the rôle of American military power, taking the term in its most inclusive sense, which he considers a favorable factor for world order. Visualizing world order very modestly as re-establishment of a balance of power in which the Soviet Union and its satellites are balanced against not merely the United States, as is now the case, but a vigorous Western Europe in between, Earle seems to follow the Chinese sage who observed, "He who sleeps on the floor cannot fall out of bed."

Immeasurably bolder is the brilliant and terse discussion of Chancellor Robert M. Hutchins on the constitutional foundations for world order, eighteen meaty pages lawyers especially will relish, whether they agree with him or not. Affirming what should be the catechism of the atomic bomb, "There is no secret. There is no defense,"[9] Hutchins expands the concept of one world as dictated by the unleashing of the atom to one good world, a world order founded on justice.

That more cautious observers prefer to discuss what they like to call an ultimate world government calls forth this crushing reply:

> I do not understand the use of the word "ultimate" in this connection. We have now arrived at the ultimate stage in history. We cannot do something intermediate now and ultimately do something ultimate. What is ultimately required of us is required of us now. If what is ultimately required of us is the abolition of war through a world government, then we had better set about trying to get war abolished through world government now.[10]

Neither what he calls tinkering with the United Nations Charter nor waiting for the completion of the moral, intellectual and spiritual foundations of the world community appeal to Hutchins any more than does the current American program:

> The policies we have been following—peace by intimidation and peace by purchase—do not seem to be succeeding very well; and, if the catastrophe comes, we shall be unable to evade a large share of the responsibility for it.[11]

Once world government is established many of the attributes of world community will grow around it, just as was the case when national governments were first established. Whatever other nations may do we can begin to establish peace by justice in the United States which will spread more effectively than any export of either arms or commodities. Conceding that ". . . we, as private citizens, cannot establish a world government, the next best thing we can do to promote world community is to talk about world government," Hutchins continues: "An important reason for talking about world government is that nobody knows what it is".[12]

Here we reach the point where the foundation of a world order becomes very much the business of lawyers. Lawyers took part in the establishment of the United States; the form of government established by the Constitution has put our government to an immense extent into the hands of lawyers, whether as administrators, legislators, lobbyists or judges, and it is to lawyers the public must look for guidance in the fashioning of a world order. Before lawyers can, as Hutchins puts it, talk about world government they will want to know what it is and this symposium is an excellent introduction to what world government is, what problems it evokes and what some thoughtful men have to say about its foundation.

WILLIAM TUCKER DEAN JR.
New York University

PATTERNS OF ANTI-DEMOCRATIC THOUGHT. *By David Spitz. New York: The Macmillan Company. 1949. $4.50. Pages xiii, 304.*

"Democracy", in this year of 1949, must take its place as the most confused and abused word in the entire English language. And although this word has been translated into nearly every other tongue and dialect on the face of the globe (including the Scandinavian), it still remains a term fraught with misuse and misunderstanding.

The only thing which seems to be universally true about democracy is that it is universally popular. Nearly everybody worships at its shrine and preaches in its name. Even behind the Iron Curtain we hear talk of its glories and, as Americans, we are somewhat startled to learn that the Soviet Union is composed of and is giving support to a number of "Peoples Democracies."

The National Association of Manufacturers uses this word as though it were synonymous with our "free enterprise" system; left-wing labor leaders contend that democracy will only become a reality in the socialized state; and others speak of the hope of democracy in terms of some loosely-defined "equality" between and among the masses of mankind.

Dr. Spitz does not concern himself with any of these concepts, ideas, and ideologies. He is a teacher of political science (Ohio State University) whose appointed task has been to consider democracy as a political phenomenon and to make an analysis and criticism of anti-democratic thought "with special

8. Page 75.
9. Page 97.
10. Page 100.
11. Page 109.
12. Page 106.

reference to the American political mind in recent times".

"The democratic state," says Dr. Spitz, "is seen to contain at least two central ingredients that crucially set it apart from all other forms of state. One is the free play of conflicting opinions. The other is the constitutional responsibility of the rulers to the ruled." And, after asserting that "the majority decision must prevail," he points out the necessity that "always minorities must be free to pursue their contrary ways and to strive unhampered for the control of political power."

With this as his postulate, Dr. Spitz begins his analysis and attack upon the philosophers of antidemocratic doctrine. He finds that they belong in general to two opposing schools of thought—one group contending that democracy is impossible and the other, conceding the possibility, which contends that democracy is undesirable. Dr. Spitz takes the members of both schools to task.

He starts with James Burnham, author of *The Managerial Revolution*, who presents the theory that the managers of capital (not the owners) control and dominate political society. He then attacks Lawrence Dennis who feels that "politics is always essentially a conspiracy of power" and that political control makes no difference to John Q. Citizen.

Next he criticizes the belief of Ralph Adams Cram that democracy is a menace which would undermine civilization; the belief of Madison Grant in the natural supremacy of the "Nordic Race"; and the belief of E. M. Sait in a political system based upon natural inequalities and hereditary differences.

Dr. Spitz concludes with an analysis and critique of the "natural aristocracy" theories of George Santayana and the theories of Irving Babbitt which would put political power in the "right class"—the class of wealth, property and character.

These seven antidemocratic philosophers are the main targets of the slings and arrows of Dr. Spitz, but by no means all. Hitler is here and so is Machiavelli—but that is to be expected. Here also, however, are Plato and Walter Lippmann, and scores of other familiar and unfamiliar anti-democrats of the intervening twenty-three centuries. And Dr. Spitz seems able to answer all of them.

The strongest arguments against democracy seem to be those centered about the alleged incompetence of the average man. Some of the author's comments on this point are of particular import.

> Democracy does not presuppose that the man in the street any more than the "average" representative has the capacity to judge and to administer effectively all the miscellaneous and specific issues with which governments are faced. All that democracy requires is that those empowered with the resolution of such issues be rendered responsible to the people, that the public "should pass its decisive verdict on the program and the achievement of its agent, the government entrusted by it with power" . . . he (the average man) is, whatever his degree of incompetence, still competent enough through the instrument of public opinion to do two things: (a) determine the general ends to which government policy is to be directed, and (b) determine who is to compose the government.

Dr. Spitz is not a lawyer and this is undoubtedly a loss to the legal profession. His book is well organized, his facts have been painstakingly collected, his positions are well-taken. In short, Dr. Spitz has written an admirable brief in behalf of democracy. And if the book is a bit dull and the language somewhat stilted, it is still more lively and interesting than most legal tomes.

Since the legal profession in America is the natural practical guardian of democracy, *Patterns of Anti-Democratic Thought* must take its place on the "required reading" lists—and Dr. Spitz must be retained "of counsel."

ALBERT P. BLAUSTEIN
New York, New York

LAW AND SOCIETY. *By Sidney Post Simpson and Julius Stone with the Collaboration of M. Magdalena Schoch. St. Paul, Minnesota: West Publishing Company. Volume I: "Law and Society in Evolution." 1948. $7. Volume II: "Law in Modern Democratic Society." 1949. $8. Volume III: "Law, Totalitarianism and Democracy." 1949. $7. General Introduction by Roscoe Pound. Pages xlvi, 2389.*

While theorists have disputed whether and to what extent the student should get prelegal and law school training in the social, economic and political backgrounds of the law for a fuller appreciation of the significance of their special study of the law, these editors, through fourteen years, have carefully planned and fashioned and now issue a monumental contribution to the American Case Book Series, which can serve just such a purpose. The active practitioner, too, may well find in these pages—formidable in number, though a veritable library in scope—many facets for pursuing his post-legal education through formal study or even through casual thumbing the pages to note the many problems here illustrated.

The editors indicate their essential emphasis to be " . . . on law in action rather than on the law in the books. Philosophic speculation about law is dealt with only insofar as it has had demonstrable effects on the social, economic and legal order". They claim they know of no similar collection of materials in any language. Space limitations may be advanced as the proverbial excuse for omission of materials from the philosophy of law, such as appear in the earlier Keener and the more recent Hall volumes of selections in the field of jurisprudence, but nonetheless what is here offered is ample to justify ". . . the main objective of this work to make possible a course which will give a significance to the study of law and the legal aspects of economics, sociology and political science which has hitherto been lacking in university studies whether in the United States, Great Britain, or the civil law countries." Roscoe Pound, in a general introduction containing his fifty-seventh variety of tabular treatments of the meaning of

the term "law", points up the essential differences between these three works—Keener as analytical, Hall as social-philosophical-sociological and the present editors as historical-sociological.

The first part of the work introduces the historical background of the law in a kin-organized society through judicious selections from Maine, Pollock and Maitland, Vinogradoff and others who have treated of law as it developed in primitive societies. From such a study the authors indicate that the student can gain an appreciation of how our law has grown from its early roots. The student can also gain some ideas for comparative purposes from studies of contemporary primitives as revealed by Malinowski, Llewellyn and Hoebel and others. A handy anthropological library adapted for the law student's use is furnished in these early sections.

Next we follow the transition from kin organization to political society with an emerging distinction between the fields of law, morality and religion, but with a relatively stable and static society culminating in feudal domination. Law itself begins to stand out as a branch of social control and furnishes machinery for securing interests.

With the rise of commerce and trade there follows a revolutionary effect upon the institutions and techniques of the law. Here the authors draw liberally for illustration from the Roman *jus gentium* and the Stoic *jus naturale* as they both developed into medieval natural law theories and also the breaches in medieval rigidity that resulted from the growth of the law merchant. English equity furnishes additional instances of change and growth. Both the law merchant and equity succeeded in England in reducing the rigidity and formalism of the common law. Parallel with this change there is the emergence of trial by jury and the discarding of irrational modes of trial. Cases, statutes, texts and commentaries once again serve to bring this historical survey forcibly to the attention of the reader.

The foregoing takes up about one-quarter of the work. The next part beginning with the period of expanding industrialism thus emphasizes the fact that three-quarters of this work is devoted to the law from the advent of the Industrial Revolution to the vibrant problems that concern the law in action today. We meet first the rise of the democratic political processes and increasing complexity of the economic organization. Such searching problems as the theory of legislation and the efficacy of codification come under consideration along with the various theories of the judicial process.

Book Two is devoted to an exhaustive survey of law in a modern democratic society with a wide choice of topics of moment. Public safety, health and comfort, methods of business enterprise, protection of investors and bank deposits, problems of employer and employee, the business cycle, maintenance of political, domestic, religious, cultural and social institutions, the conservation of resources, the rise of administrative agencies, the limitations of social control through law—these and many other subjects appear in the cases and articles and statutes that together focus each subject into veritably hundreds of briefs on hundreds of current problems.

The last volume is unique and well worthy of study by all who would understand the world we live in. In it we have the basis for a comprehensive study of the sharp contrasts in the law as practiced in democratic and in totalitarian countries. Despite difficulties in getting authoritative statements about what happened in Nazi Germany and Fascist Italy and what is happening now in Communist-dominated states, the authors have succeeded in presenting ample material, much of which has never before appeared in English. They adopt admittedly unsatisfactory but necessary criteria by relying ". . . so far as possible for adversely critical data upon sources generally friendly to the regime, and for favorable data upon sources in other respects generally unfriendly to the Soviet System." They cover propaganda, the submergence of private rights, executive legislation, decline of the judicial process, the place of the party in social control and by way of contrast, law in democracy in these times of change when, as the last chapter suggests, the impress of the atom may ". . . remake our legal institutions everywhere in increasingly international terms." An optimistic note for this study of law through the ages can be gleaned from Roscoe Pound's concluding remark—made despite the current totalitarian barbarities—that ". . . . man's achievement in law is not the least of what he has achieved in the history of civilization."

LESTER E. DENONN
New York, New York

REVENUE ACT OF 1948. *Edited by Paul A. Wolkin and Marcus Manoff. New York: Matthew Bender and Company. 1948. $10. Pages xxiii, 667.*

It is hardly necessary today to lecture the practicing Bar on the great importance of legislation and the legislative process in our legal system. The dominant place of legislation in most branches of the law is one of the facts of modern life which the young practitioner soon learns he must accept, although when he closes his casebooks and emerges from law school he is frequently ill prepared to face it.

There have been several reasons why the schools and the profession have been slow to accord legislation its proper place in our jurisprudence. One reason is the emphasis that the common law system lays on judicial decisions as the source of law. It is said that Dean Langdell, in his great devotion to the common law, never did recognize the place that legislative materials should have in a great law library, much to the grief of later librarians of the Harvard Law School, who found gaps in the shelves that had to be filled. Another reason which operates with greater force today is the difficulty of making

legislative materials readily available in usable form. Our system of reporting, digesting and indexing judicial decisions performs its important task with great efficiency. We can locate with comparative ease not only the judgment in a case, but the articulated reasons for its rendition. It is true that statutes now reach our desk soon after their adoption, but the process of their enactment is often shrouded in mystery. When one must interpret and apply a statute it is just as important to know its background as it is to understand the reasons for a court decision which is cited. That background is to be found in committee reports, committee hearings and legislative debates. All too frequently these are not even published, but when they are the task of finding them is not infrequently quite beyond the facilities of the average lawyer.

There is less reason for this situation to exist in the field of federal revenue legislation than in many others. Tax legislation is pressure legislation of the strongest sort. Proponents and opponents are usually articulate to a high degree. This is reflected in the legislative hearings, reports and debates. The Internal Revenue Code is one of the most intricate and carefully-drafted pieces of legislation on the books. Reports of the Ways and Means Committee of the House and the Finance Committee of the Senate are drafted specifically with a view to influencing the interpretation of the statute. It is not unusual for the decision of a case to turn on an example given or a statement contained in a committee report. Cases of this kind—see *Commissioner* v. *Korell,* 176 F. (2d) 152 (C. A. 2d, 1949) for a recent one—can be found almost at random.

Yet it was not until 1939 that committee reports on tax legislation were regularly published in any readily available source. In that year the Bureau of Internal Revenue began their regular publication in the Internal Revenue Bulletin. Committee hearings are published by the Government Printing Office and are available to those who follow government publications, but this is no mean task.

Consequently volumes such as this one by Messrs. Wolkin and Manoff are to be welcomed and encouraged. For the first time the editors have attempted to gather in one place the complete materials on the legislative history of a federal revenue statute. Included are the text of the bill in its various stages, committee hearings, committee reports, debates on the floor, and the President's veto message. The nearest approach to such a book we have heretofore had is the excellent volume by Seidman, entitled *Legislative History of Federal Income Tax Laws, 1938-1861.* The present work is narrower in scope in that it is limited to a single statute, but it is more inclusive in the materials covered. Seidman did not attempt to do more with committee hearings than to give brief digests of their contents when he deemed them of special interest. The historical sweep of his work probably made a more ambitious course impracticable. It is also true that of the various source materials hearings frequently have the least value for solving problems of statutory construction. However Messrs. Wolkin and Manoff have included committee hearings in full in so far as they have any relevance in determining the meaning of the provisions of the Revenue Act of 1948.

The great task which the editors faced was the arrangement of this amorphous mass of material so that the reader could find the object of his search with the least possible lost motion. The plan adopted was to follow each separate portion of the Act (title, section, paragraph, etc.) with the material having a bearing on that portion. The more general material is placed under the more general heading to which it relates. Material of such a general nature as not to have a more appropriate place elsewhere is found under the enacting clause. Cross references throughout the book refer the reader from the more specific material to the more general that has a relevant bearing on the particular problem. Under each portion of the Act the material is arranged in historical sequence as follows: the provision as it appeared in the bill when introduced in the House; the relevant House Committee hearings; the provision as reported out; the House Committee report, majority and minority views; House debate and action; bill as passed by the House; and the same sequence in the Senate. Certain material has been excluded as not sufficiently relevant to justify the space it would take. Included in this category are amendments that were not passed and that were not germane to the bill as enacted; material concerning the economic and budgetary justification for or against the modification of tax rates as such; and material printed in the *Congressional Record* which was not a part of the actual debate. At the top of each page appears the section number of the Act and the Internal Revenue Code to which the material on the page relates. There is no general subject index but this is not a deficiency. The reader is not expected to turn to the book until he has ascertained the particular provision of the Act that he seeks to research.

This should be a highly useful book. The 1948 Act, particularly, because it created the marital deduction in estate taxation, is a very important piece of legislation for the general practitioner as well as the tax expert. Most lawyers are estate planners whether they use that currently over-advertised term or not.

In their preface the editors lead us to expect that this volume will be a forerunner of others to come on the legislative history of federal legislation of importance. It is to be hoped that we will not be disappointed in that expectation.

PAUL W. BRUTON
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PRICING OF MILITARY PROCUREMENTS. *By John Perry Miller. New Haven: Yale University Press. 1949. $4.00. Pages xv, 292.*

As a compilation of historical data concerning the pricing of supply

contracts during World War II, this book provides a general background for anyone interested in the application of sound procurement policies for the Armed Services in peace and in war. The subject is limited to pricing primarily, and does not attempt to cover the entire concept of the procurement function.

The treatment is essentially historical, illustrated with the author's observations and criticisms. If there are weaknesses of any consequence, they lie in the fact that such a mass of historical data might tend to confuse the uninitiated should a too-literal application of the principles involved be attempted.

It would appear that the outstanding value of this book to those responsible for military procurement consists in the thought-provoking questions stated or implied. As the author states, pricing cannot be accomplished on a formula basis since procurement pricing problems are numerous and complicated, depending upon the kind of war one is making procurement for—and this does not and has not historically always followed the same pattern. As a matter of fact, from my own experience with Navy procurement during the last war, I have concluded that some of the outstanding procedures and instruments were developed as a result of wide experience, knowledge of merchandising generally and good judgment in the handling of people rather than through an overly conscientious study of all the interrelated causes and effects.

Chapter 16, reporting the conference at which industry and armed services representatives reviewed the conclusions, arguments, and recommendations of the author, gives a very interesting background to the subject matter contained in the book itself.

Several other phases or sections of Mr. Miller's book seem to me to have particular usefulness; for example, his reference to the limitations of formalized competitive bidding and the desirability of more extensive use of the negotiated contract. The author's comments also adequately call attention to the importance of developing specialists in procurement work. The chapter on planning between World Wars I and II presents food for thought to those presently engaged in similar planning for future emergencies. The description of types of contracts in Chapter 9 should be of very appreciable assistance to both the services and government contractors.

It is natural that in any discussion dealing with so many interrelated activities, some controversy should occur; and complete agreement with all the comments here would, therefore, not be expected. Some of the opinions expressed in Chapters 6 and 7 concerning the related functions of OPA and the Services on price control, I am in total disagreement with. For example, Mr. Miller writes that the Services, through exemption of military items, were in a preferential position to bid for resources. This statement is open to question. Actually, from my own knowledge, the Services do not pay higher prices than were paid for unexempted items. Further, the statement that OPA's administration of price control did not interfere with production for the Services, I definitely challenge. The author, while admitting that bottlenecks arose, claims that necessary relief was obtained without undue delay. This was not always the case. On occasion it was necessary to appeal to the Administrator to change a theoretical philosophy in favor of a more practical and realistic approach. Many of the people handling the OPA problems were young, inexperienced, overeducated and theoretical.

Mr. Miller adequately describes this difference in philosophy between OPA and the Services. Had the policy of OPA been carried to extremes, a mandatory order would, of necessity, have been issued by the Military Services whenever a manufacturer refused to continue production at a loss on a given item or contract. Since there were many such instances, the effect on the war would have been serious. In addition, recourse to the courts for relief would have become common practice. Actually the Services and industry alike may well be proud of the fact that comparatively few mandatory orders were issued.

It would not be possible to include in one publication all the background which led to the introduction of the various procurement procedures for the Armed Services. In the selective process, Mr. Miller has shown good judgment. It might be noted further that many of the methods introduced during the last war are in effect today and are being used by procurement officers generally. Mr. Miller, in his book, points out some of these effective instruments, which have now become permanent procedure.

FRANK M. FOLSOM
New York, New York

LABOR RELATIONS AND FEDERAL LAW. *By Donald H. Wollett. Seattle: The University of Washington Press. 1949. $3.00. Pages xxv, 148, Appendix 30.*

While by no means apparent from the title, Professor Wollett, of the University of Washington Law School, has produced a rather detailed critique of the Taft-Hartley Act. Since it now appears probable that the Taft-Hartley Act will not be repealed, or even amended, by the 81st Congress, his evaluation may serve to influence future legislative action.

The book is a valiant effort to rationalize collective bargaining as a public good and to evaluate the individual provisions of the law as they help or hinder development of that process. Professor Wollett's sincerity of purpose and intellectual honesty are beyond question. He finds the Taft-Hartley Act neither all good nor all bad. He finds it makes some necessary reforms (*e.g.*, requires unions to bargain). He criticizes it as "schizophrenic" in spots. He finds it goes further than his view of sound policy dictates in other spots (*e.g.*, prohibition of all secondary boycotts), and that it leaves some real problems inadequately handled (*e.g.*, monopoly unions and national emer-

gency strikes). While some of his assumed premises, and consequently some of his conclusions, will be denied by reasonable men of equal sincerity and good will, his analysis is unusually thorough, his logic is eminently sound and the book is highly readable. It emphasizes a truism, without stating it, that until we actually agree upon the ends we want to achieve by legislation, we can hardly design legislation that will achieve uniform satisfaction.

After an introduction which seeks to justify labor unions as necessary instruments of economic power, and "collective bargaining", which was legally established as a right of employees by the Wagner Act in 1935, as the natural means of union functioning, the author discusses the changes made by the Taft-Hartley Act under two major parts. Part I covers "The National Labor Relations Board and Its Operation". Its four chapters are headed: "Structure and Procedure", "Jurisdiction", "Subject Matter" (with twenty-four major sub-headings) and "Summary and Evaluation". Part II deals separately with the "Private Law" and "Criminal Law" aspects of the Taft-Hartley Act along with the author's over-all "Conclusion". The text of the Act is attached as an appendix.

The author's final statement in conclusion is, "Perhaps collective bargaining will ultimately fail, but available data do not lead to that conclusion, and in light of the unhappy alternatives, the policy [of governmental encouragement] merits continuation." This reviewer can agree that some protection of the right of employees to bargain collectively merits continuation; but this reviewer must take strenuous issue with some interpretations placed on "available data", with the claimed certainty that the alternatives are "unhappy" for the nation and its people at large, and with the author's implication that government protection of the right to collective bargaining must be so complete as to override equally important rights of individual workers, consumers and corporate stockholders. These latter two groups of people actually are thoroughly commingled with industrial workers and they come into conflict with certain industrial workers as a special-interest group only through the pressure aspects of collective bargaining.

Government should protect rights of all individuals and legitimate groups insofar as possible without unjustly interfering with the rights of other individuals or groups. Government in a free society, under the guise of protecting the right to bargain collectively, should not undertake to guarantee that the persons who do organize for collective bargaining shall be successful in achieving all or any of their selfish purposes. Some of Professor Wollett's suggestions seem to go far in this direction. The necessary limitations of this review permit discussion of only a few.

There is nothing "schizophrenic" about protecting the right not to join a union while at the same time protecting the right to join. It is not clear that the Wagner Act was ever meant to go further than to permit freedom of choice to the employees in individual employing units, or that the policy of encouraging collective bargaining, by making it both legal and practicable, was meant to deny the right of individuals not to participate. If this be true, there is no justification for permitting organized workers in one plant to establish a boycott in order to force organization of unorganized employees of another plant, where the employees may even already have voluntarily rejected organization. If organization for collective bargaining is indisputably good, and the right to have it is protected, there is no reason to suppose that any workers will long remain unorganized. If they don't want it, others should not be permitted to force it upon them.

There is no validity to the author's stated "implications of collective bargaining" that neither a particular plant nor a particular industry can be expected to exist part union and part nonunion. Many such plants and many such industries do exist without unstable labor relationships. Until free men of good will are unanimous in their thinking on the subject, such conditions can be expected to and should be permitted to exist. Collective bargaining should not survive if it cannot be developed on a voluntary basis with positive government protection, but without government-protected compulsion.

Professor Wollett says the trade union, among other things, is "the worker's private device for getting a larger share of the national income" made inevitable by permitting "the corporate structure as the businessmen's device for getting a larger share of the national income." He does not say what "other things" the trade union is, and it is hard to see what else it may be except possibly a fraternity for social intercourse and class-conscious philosophy. He completely fails to recognize, however, that the corporation is a device which enables every owner of life insurance and every small investor to make productive use of his savings without risk of more than the amount invested, and, even more important, that it is a device for the pooling of capital, in quantities otherwise impossible, for the production of more goods for more people at lower prices. It is an available tool of all the people and, properly managed, it serves all the people. Selfish abuses of its use are, and should be, regulated.

Perhaps the huge corporation does make collective bargaining desirable for the large group of people whom it employs, but that would not seem to justify its characterization as the tool of a selfish class of people called "businessmen" to gain an unjustifiable share of the national income at the expense of a class of people called "workers". Many large corporations have more stockholders than they have employees, and in a surprising number of cases they are the same people. All people are consumers and, as such, profit from corporate enterprise. The false "class-struggle" philosophy suggested by

the above comparison of unions and corporations is so insidious that it most probably was unintentional, but that does not justify its being ignored.

Sound collective bargaining need bear no relation to class struggle, but rather should represent salesmanship of desires and economic facts on behalf of citizens who are employed to do various kinds of work, to other citizens who are employed to manage corporate enterprise. Management must balance satisfactorily to each, the demands of consumers, investors and employees if the enterprise is to exist. Unless the right to withhold work by strike is judiciously used by organized employees with statesmanlike recognition of the necessity of satisfying the other two groups on which the enterprise depends, collective bargaining can degenerate into a stupid and hopeless battle from which no long-range good can come for anyone concerned. Any government weighting of the balance in favor of employees contributes to that result. Such a condition is bound to doom collective bargaining, if it does not completely destroy the American dream.

This book deserves wide reading among lawyers interested in the subject for the information and mental exercise involved. As perhaps has been adequately indicated, this reviewer does not believe it should be accepted as stating wholly sound doctrine.

ROBERT D. MORGAN
Peoria, Illinois

BEHIND THE BAR. *Second Edition. By A. E. Bowker. London: Staples Press Limited. 1948. 18 shillings net. Pages 323.*

Frequently it is from the confrere of an important personality that the clearest picture of that personality is obtained. Thus, we know much of Socrates because of the writings of Plato, and we can clearly visualize the great Johnson only by listening to the descriptions of Boswell. So it is that I believe many Americans who have heard of Sir Edward Marshall Hall and Sir Norman Birkett will find their impressions of these great English barristers considerably enriched by the writing of A. E. Bowker in *Behind the Bar.*

This volume performs a threefold purpose. As already suggested it furnishes vignettes on the lives of two of the world's greatest twentieth century lawyers, and adds in an important way to the biographical material which has been and will doubtless be written about these two men. Secondly, *Behind the Bar* is an autobiographical work of a man who has lived an interesting life, during which he has gained considerable renown in his chosen field. Finally, the volume in question describes a profession relating to law for which there is no American counterpart—the barrister's clerk.

As a brief professional biography of Marshall Hall and Norman Birkett this book contains a wealth of interesting material. Mr. Bowker spent over fifty years in British legal circles, most of which time he served as barrister's clerk for one or the other of the two great counsels just mentioned. In so doing Mr. Bowker was intimately associated with the trial of innumerable spectacular cases in recent British legal history. Mr. Bowker watched the great advocate Marshall Hall as he acted in such trivial matters as the defense of a brewer named Edward Lawrence who was charged with having bitten a policeman's thumb; and he was present on innumerable occasions when Sir Edward successfully argued the defense in celebrated murder cases. Similarly, the author watched Sir Norman Birkett as a barrister, and later as a judge, in some of the leading lawsuits of our day, and it was Mr. Bowker who accompanied Sir Norman to Nuremberg and there observed the great justice as he represented the United Kingdom at the trial of the leaders of the Nazi Party. The author writes with a facile pen and recounts incidents from the lives of his superiors which are exceedingly interesting and instructive.

As already suggested, *Behind the Bar* is also an autobiography of Mr. Bowker. The author tells his story from the time that as a lad of thirteen (who admittedly would have preferred the scarlet tunic of one of His Majesty's Regiments) he goes to Temple Gardens as an office boy at the "princely wage of eight shillings a week" to the long and arduous months of the Nuremberg Trial. During this period the author has met many of the famous, and not a few of the infamous, men of England, and each of them is pictured with remarkable clarity as they cross Mr. Bowker's path. His own life has been industrious and interesting, and in his narration he modestly depicts the substantial contribution he has made to the success of his principals.

The American lawyer who takes the well-spent time to read this volume may be most impressed by the account which is given of the duties of a barrister's clerk, and, indeed, that lawyer may find himself wishing that with our borrowing from the common law we might also have taken this office. The barrister's clerk is more than a secretary and less than a partner; he attends to such trivia as the day-to-day management of the office and yet he is trusted absolutely with the determination of the fees to be charged and often with whether or not a case will be taken; he does not have professional existence apart from "his" barrister, yet he receives directly from the client a fee in every case which the barrister accepts. In short, the clerk is at once a highly skilled business manager, who can shelter his employer from the *minutiae* which may dissipate the energies of the practitioner, and at the same time a trained expert who can search out the law or otherwise assist his associate in the preparation of a matter for trial.

Behind the Bar will also give its American readers a clear and fascinating picture of English legal customs and traditions. It will remind one that an English barrister does not discuss fees with clients, but leaves this entirely to his clerk. Perhaps

this is just as well since the barrister, in any event, can never sue for a fee. The American reader may tire just a bit as he reads of the annual hard-fought athletic matches which are played between the Bar and the clerks, and he may be somewhat perplexed by the complicated mechanics of the ordinary English lawsuit from start to finish.

The volume in question is not without its minor defects from our viewpoint. The author in recalling his friends of the Bench and Bar sometimes presents lists of names which will probably have little or no meaning to the reader in the United States. A few pages may also be required to become familiar with Mr. Bowker's style of presentation, for it consists of directness, short paragraphs and much dialogue which reminds one on occasions of a transcript. Further, one may be baffled a bit by a few of the localisms employed, as for example, when he finds the author, in speaking of a cricket player, saying: "He played a fine not-out innings of sixty, and from start to finish played a straight bat." However, the few imperfections noted—if weaknesses they be—are far outweighed by the value and enjoyment which is to be derived from a reading of *Behind the Bar*. This reviewer hesitates to recommend additional reading material to members of a profession whose required reading grows relentlessly with each arrival of the mail. However, any practitioner who does pursue this small volume will be royally entertained and handsomely rewarded.

No review of *Behind the Bar* would be complete without mention of the interesting and excellently written foreword by Judge John J. Parker, who served, it will be recalled, as a representative of the United States at the Nuremberg Trial. Judge Parker with the fluent and scholarly style which has always characterized his work speaks of his personal acquaintance with Sir Norman Birkett and Mr. Bowker.

LOYD WRIGHT

Los Angeles, California

Vestigial Remnants in the Law

(Continued from page 983)

Marshal Was Concerned with Military Discipline

The court of the constable and marshal was concerned with pedigrees, heraldry, slanders upon men of noble blood and the right to bear arms. Most important was the administration during the Middle Ages of laws governing men in military service. "Always," says Hale, "preparatory to an actual war, the kings of the realm, by advice of the constable and marshal, were used to compose a book of rules and orders for the due order and discipline of their officers and soldiers, together with certain penalties on the offenders; and this was called martial law." Statutes of Richard II and Henry IV show that parliament wished to prevent the court from encroaching upon the province of the common law. The effect of the statutes was to declare that over matters relating to war alone outside the realm the court had unlimited jurisdiction, civil and criminal; but that within the realm it only had jurisdiction over alien enemies, in matters arising out of some past war, such as prisoners or prize, or in cases where a war was actually proceeding.

The Tudors attempted to extend the jurisdiction of the court since jurisdiction over soldiers could be confused with a jurisdiction over all citizens liable to serve as soldiers. And on "the principle that prevention is better than cure it was plausible to say that the jurisdiction of the court was legal, not only when war was actually proceeding, but also at a time of merely apprehended disturbance." Under the Stuarts, the attempted jurisdiction of the court was attacked and the Petition of Right declared illegal extensions of jurisdiction. It denied the claim that the court had any jurisdiction over persons in the realm in time of peace and clearly settled what was a time of peace: when the central courts were open and the sheriff could execute the king's writ. Centuries later the military jurisdiction of the court came to be exercised by officers of the army, recognized by James II in 1687. Since 1689 jurisdiction over the army has passed to courts martial. The joint effect of the Petition of Right and of the development of courts martial has been to vest jurisdiction over civilians in times of riot and rebellion in the ordinary courts and not in military courts.[9]

And so the marshal suggests the Marshalsea, abolition of imprisonment for debt, John Howard and Dorothy Dix and the long struggle to humanize the law. It also suggests not only the former grandeur of the marshal but the long conflict between the common law and its rivals, the hard-won supremacy of civil over military power and the unending battle for the protection of the individual against arbitrary governmental power.

9. 1 Holdsworth 392, 573-580. As related, see *Ex parte Milligan*, 4 Wall. 2 (U. S. 1866); 3 Warren, *The Supreme Court in the United States History* (Boston 1923) 110, 145-171; McLaughlin, *Constitutional History of the United States* (New York 1935) 625-627; *Ex parte Quirin*, 317 U. S. 1 (1942); *Duncan v. Kahanamuku*, 327 U. S. 304 (1946); *Application of Yamashita*, 327 U. S. 1 (1946); *Hirota v. MacArthur*, 335 U. S. 876 (1948). See also, 1 Stephen, *History of the Criminal Law of England* (London 1883) 207-216; Palmer, "Edward Coke, Champion of Liberty", 32 A.B.A.J. 135, March, 1946. That the surname "Marshall" may come not only from a great commander or official, but from a blacksmith, farrier or horse-leech, see Weekley, *The Romance of Names* (New York 1914) 45; Weekley, *Surnames* (3d ed., New York 1937) 106; Bardsley, *A Dictionary of English and Welsh Surnames* (London 1901) 516; Weekley, *The Romance of Words* (2d ed., New York 1913) 89-90. On the office of the Earl Marshal as hereditary in the Duke of Norfolk, see *Whitaker's Peerage* (London 1916) 80, and as master of ceremonies, *id.* 92.

MISCELLANEA

MEMBERS OF THE LEGAL PROFESSION throughout the world are invited to attend the Third International Conference of the Legal Profession which will be held in London, July 19 to 26, 1950, under the auspices of The International Bar Association. The barristers and solicitors of England will be hosts. The President-Elect of The Law Society, Leonard S. Holmes, and the Chairman of the General Council of the Bar, Godfrey Russell Vick, have been nominated as Co-Presidents of The International Bar Association and will preside at the plenary sessions of the Conference.

Those who desire to attend should communicate immediately with Amos J. Peaslee, Secretary General, The International Bar Association, 501 Fifth Avenue, New York 17, New York. Forms of enrollment and of notice of intention to submit papers on topics to be considered at the Conference will be sent upon request.

Travel by sea and air is expected to be very heavy next summer because of the large number of persons going to Europe for Holy Year. Visitors from overseas are strongly advised to book their passages without delay. Those who attempt to reserve hotel accommodations in London later than April 1 are likely to be disappointed.

THE SOUTHWESTERN LEGAL CENTER at Southern Methodist University in Dallas, Texas, will be ready for occupancy in the fall of 1950, according to the November issue of its official publication. On September 17, final approval was given by the executive committee of the University for the erection of the second unit of the Center, the Lawyers Building. Work on the superstructure of the Main Building is under way.

Completion of the Center will mean the realization of two years of planning, five months of fund-raising efforts and thirteen months of building. On September 15, Dean Robert G. Storey of the Southern Methodist University School of Law announced that the goal of $1,000,000 for capital funds had been exceeded by $8,602.38, but Dean Storey said that the Foundation will continue to seek special gifts to complete the physical plant. He explained that the total cost of the two buildings is expected to be $1,500,000.

"After the buildings are finished," the Dean continued, "the Foundation will create research projects in specialized fields of the law, such as oil and gas, taxation, insurance, administrative law and international law."

Two activities of the Foundation are already in operation. The Honorable Hatton W. Sumners is director of the Foundation's research in the fundamental principles of law and government, and the Dallas Junior Bar, the City-County Welfare Board, the Law School and the Foundation are operating the Free Legal Aid Clinic together.

INTRODUCING JAMES SIMSARIAN of the Department of State at the luncheon in celebration of United Nations Day by the Patrons of the International Bar Association held in Washington, D. C. on October 4, George Maurice Morris, toastmaster, said in part:

> We are here in celebration of United Nations Day. Only students of the history of men's efforts to govern themselves are adequately equipped with the patience and understanding to have faith that the "birth pains" of the United Nations Organization are nothing more than "birth pains". It is idle to suppose that the United Nations, as now constructed, will serve for all time as the governing agency for all men. On the other hand, wise men know that man, in the past, has groped his way toward social living and has proceeded no faster than he is equipped to proceed at the moment. The achieving man seizes the material at hand and acts upon it. He may long for better material but he does not wait for its arrival.
>
> Neither is the experienced man unduly disturbed by controversy. As Thomas Jefferson once said, "Confidence is everywhere the parent of despotism—free government is founded on jealousy". It is the controversy respecting the virtues of the United Nations which gives us the best assurance of its perfecting.

THE FIRST FRENCH WOMAN JUDGE, Mme. Charlotte Lagarde, of the French High Court of Appeals, has arrived in New York to attend the seventy-fifth anniversary observances at Smith College and the inauguration of Benjamin F. Wright as the college's new president. She will receive an honorary doctorate. In her legal career Mme. Lagarde has consistently blazed the trail for French women, being the first woman to pass several difficult competitive law examinations. Until her appointment as France's first woman judge in 1946, Mme. Lagarde was a professor of law at the University of Rennes. The wife of a prominent law professor, she is the mother of six children. She is the author of numerous legal works.

THE UNIVERSITY OF CALIFORNIA at Los Angeles late in September opened its doors to its first law

(*Continued on page 1037*)

Memorial for Justice Wiley Blount Rutledge

■ Presented at the Memorial Service for Wiley Blount Rutledge at All Souls' Church, Unitarian, Washington, D. C., Wednesday, September 14, 1949, at 3 p.m. by the Reverend A. Powell Davies, D. D.

■ Bereavement, no matter how often it comes to us, never grows familiar. We can be reconciled to life's uncertainty but we cannot make friends with it. We can know the truth of the Scriptural saying that "in the midst of life, we are in death," and yet to our stricken hearts, grief, when it comes, comes always as a stranger. Especially are we unprepared for it when one is lost to us untimely soon: one upon whom we had counted as we looked to the years ahead.

And that is the loss we share together as we meet here this afternoon. Our grief is the measure of it, and there is no way to lighten it. We must carry it in our hearts, for that is what bereavement is.

Nevertheless, it is not sorrow alone that brings us here, but also the pride of memory. For we have known one whom it was a precious thing to know: one because of whom we shall have more of faith and less of doubt, believing more readily in every worthy aim and honest purpose. It is in this last thought, if anywhere, that we shall find encouragement and solace; for if it reminds us of the extent of our loss, it also recalls to us how much was given that we shall never lose.

Justice Rutledge Won Both Esteem and Affection

Of some men who have risen to renown in public life, it might be said that they have won much esteem but little affection; of others it might be said that they have been loved more than they were esteemed; but of him whom we mourn today, it can be said that he won both love and esteem in equal and overflowing measure.

Born into the home of a Baptist minister, at Cloverport, Kentucky, on July 20, 1894, Wiley Blount Rutledge learned early that the one great distinction in human life is between right and wrong, and that, although the battle between them may never be ended, each of us who would take his part in the world must choose his side. In the years that followed, although he came to know how many-sided is the battle, how sudden some of its onslaughts, how elusive its configurations, and how guarded its retreats, he counted no other distinction greater than this one – the distinction between right and wrong–and from its claims and obligations, no temptation or inducement was sufficient to turn him aside.

After his college years, at Maryville, Tennessee, and at the University of Wisconsin, Justice Rutledge decided to take up the study of law. Before this was possible, however, he had to win back his health, for he had learned that he was a victim of tuberculosis. Near Asheville, North Carolina, and later in Colorado, he won this struggle, and with his victory came a deepening sense of the profounder values and an intensified wish to serve them.

He Is Best Remembered As Teacher to Many

His law studies completed, he practiced his profession for a time, and then returned to the University of Colorado to teach. It was soon recognized that besides his unusual talent for teaching, he had the rare gift of engaging the complete enthusiasm of his students for the inner purpose

Fabian Bachrach

WILEY BLOUNT RUTLEDGE

of what was taught. From Colorado, he went to Washington University, St. Louis, where he became Dean of the Law School in 1930, and from there to the University of Iowa in 1935. To many who mourn his loss today it will be as a teacher that he is best remembered; they will never forget that under his influence they came to know that all the provisions of human society should serve human necessity: that although it is fitting that law should be called majestic, yet its majesty should not be at the expense of its ministry, and that between law and justice there is likely to be conflict wherever this truth is not perceived.

Because of his growing reputation, he was called to Washington in 1939 to serve on the U.S. Court of Appeals; and in 1943 he took his place on the Nation's highest tribunal, in the service of which and of the Nation, he expended his energy without regard to cost, and while still in the prime of his years was stricken

and passed from us, leaving us lonely and bereft.

What he was to those who loved him most and knew him best, and whom he loved so dearly, I shall not attempt to say, for even the tenderest words can be intrusive at an hour like this. To his beloved wife and family, we extend our warmest sympathy.

He Taught That Justice Lives Through Men

And we remind ourselves that in his passing he has left us not only grief, but something of the nobility of his own character, the quality of his own devotion. He has been a beloved teacher, not only to the students who went so eagerly to his classes, but to all of us. He has taught us that justice lives not only through laws but through men. He has caused us to see that from the lowliest level to the loftiest, the great distinction is still between right and wrong, and that although the law may be austere, the love of justice can be passionate. We shall remember always as we think of Wiley Rutledge that the citizen of a free country, if he wishes his country to remain free, must respect legality; but that even more than this, he must love righteousness. Only so shall the laws that free men make serve the cause of justice and ensure the future of a free mankind. For no matter what perplexities assail us, or how uncharted be the paths ahead, the distinction he would have us remember is the distinction between right and wrong.

I recall as I stand here some words I heard him speak—I think it must have been about a year ago—in the company of a few of his friends. "We shall only survive," he said, "if we deserve to survive; and only by deserving freedom shall we remain free."

The natural kindness of Wiley Rutledge, his gentleness, his ready comprehension, his flashes of humor, his quick sympathy, his warm humanity, his directness of thought and purity of motive: these, like his humility and the friendly dignity of his bearing, we shall not soon forget. But most of all, I think, we shall remember how faithfully he followed the guiding precepts of the greatest of all Americans, Abraham Lincoln, his exemplar, whom he loved: "to do the right as God gives us to see the right", and thus guided, to "finish the work we are in".

Notice by the Board of Elections

■ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1950 Annual Meeting and ending at the adjournment of the 1953 Annual Meeting:

Alabama	Missouri
Alaska	New Mexico
California	North Carolina
Florida	North Dakota
Hawaii	Pennsylvania
Kansas	Tennessee
Kentucky	Vermont
Massachusetts	Virginia
Wisconsin	

An election will be held in the State of New Jersey for State Delegate to fill the vacancy in the term expiring at the adjournment of the 1951 Annual Meeting. The State Delegate elected to fill the vacancy will take office immediately upon the certification of his election.

Nominating petitions for all State Delegates to be elected in 1950 must be filed with the Board of Elections not later than April 20, 1950. Petitions received too late for publication in the April JOURNAL (deadline for receipt March 5) cannot be published prior to distribution of ballots, fixed by the Board of Elections for April 27, 1950.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois. Nominating petitions must be received at the Headquarters of the Asociation before the close of business at 5:00 P.M. April 20, 1950.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

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EDITORIAL OFFICE

1140 North Dearborn Street.....Chicago 10, Ill.

The Communists and the First Amendment

The eleven Communists in New York were indicted under the Smith Act, passed by Congress in 1940. (18 U.S.C. § 10; now 18 U.S.C. § 2385, in the new U. S. Criminal Code). The Act, in substance, forbids advocating or teaching the overthrow or destruction of the United States Government by force or violence; it does not require any overt act of destruction, but is directed solely to the advocating and teaching.

There are those who contend that neither the Smith Act *per se*, nor the facts in this trial under that Act, meet the "clear and present danger" test of Mr. Justice Holmes and the unanimous Court in the *Schenck* case, 249 U. S. 47; and that until the mere advocacy and teaching of force and violence to destroy the Government constitutes such a "clear and present danger" to our national security, the defendants, and others, have the right, under the First Amendment, to advocate and teach such destruction.

In this connection, Judge Medina indicated that "it is not the abstract doctrine of overthrowing or destroying organized government by unlawful means which is denounced by this law but the teaching or advocacy of action for this accomplishment of that purpose by language reasonably and ordinarily calculated to incite persons to such action. . ."; that if the jury found the defendants guilty of the acts charged in the indictment, he was of the opinion that "sufficient danger of substantive evil" existed in the activities of the defendants to sustain the validity of the Smith Act; and that if "the defendants had an intent to cause the overthrow and destruction of the Government of the United States by force and violence . . . as speedily as the circumstances would permit it to be achieved," the Constitution would not prohibit Congress from putting a limitation on speech having such an objective.

Judge Medina thus followed the doctrine of the *Gitlow* case (268 U. S. 652), in which Mr. Justice Holmes and Mr. Justice Brandeis dissented, just as they had in *Abrams* v. *United States*, 250 U. S. 216, and in *Schaefer* v. *United States*, 251 U. S. 466.

In the *Gitlow* case the seven-to-two majority said:

> That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. [Page 669.]

And the *Gitlow* majority endorsed the following statement:

> Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government without waiting until there is a present and imminent danger of the success of the plan advocated. If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government. . . . [Page 669.]

In *Bridges* v. *California*, 314 U.S. 252, 262, 263, following many changes in the personnel of the Court, the five-to-four majority said:

> . . . the "clear and present danger" language of the Schenck case has afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was an issue. It has been utilized by either a majority or a minority of this court. . . .
>
> What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. . . . For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.

In *Terminiello* v. *Chicago*, 337 U. S. 1, decided May 16, 1949, the five-man majority, consisting of Justices Douglas, Black, Reed, Murphy and Rutledge, held that punishing the maker of a speech which actually induced a "breach of the peace" was a violation of constitutional principles protected by the First Amendment. In his dissent, Mr. Justice Jackson said:

> In this case the evidence proves beyond dispute that danger of rioting and violence in response to the speech was clear, present and immediate. If this court has not silently abandoned this longstanding test and substituted for the purposes of this case an unexpressed but *more stringent test*, the action of the state would have to be sustained. [Italics supplied.]

The Smith Act, which is patterned after the New York statute involved in the *Gitlow* case, was in 1943 assailed in *Dunne* v. *United States,* 138 F. (2d) 137 (C.A. 8th), and sustained on the ground that the statute fell within the *Gitlow* case and not within the *Schenck* case. *Certiorari* and two successive petitions for rehearing were denied by the Supreme Court (320 U. S. 790, 814, 815); but, of course, denial of *certiorari,* as the Bar has been told many times, imports no expression of opinion by the Supreme Court on the merits of the case (*House* v. *Mayo,* 324 U. S. 42, 48).

After the defendants' application for bail had been denied by Judge Medina, an application for bail was made to the Court of Appeals for the Second Circuit. Attorney General McGrath, in that court, conceded that there was arguable doubt as to the constitutionality of the Smith Act. Thereupon Judges Learned Hand, Thomas W. Swan and Jerome N. Frank admitted the eleven defendants to bail in varying amounts, "the prosecution having upon argument conceded that the appeal herein raises a 'substantial question' (Rule 46 (a) (2) of the Rules of Criminal Procedure). . ." This rule provides that bail may be allowed pending appeal "if it appears that the case involves a substantial question which should be determined by the Appellate Court".

Thus the issue between the legal philosophies of the *Schenck* case and of the *Gitlow* case will continue apace through the Court of Appeals, and until again faced and resolved by the Supreme Court.

This issue has split the Court many times. Will it do so again?

■ *What Is "Security"?*

What is "security"? The recent labor strife over pensions and disability insurance, the passage by the House of Representatives of H.R. 6000 to extend the coverage of the Social Security Act, the attempts diplomatically to isolate Russia, are all manifestations of a desire for security which seems to have American thinking temporarily in its paralyzing grip. It is normal enough to wish nostalgically for the carefree, worry-free days of boyhood with all their paternal safety. Can we find security in a world where Russia, too, possesses the atom bomb, and where scientists paint pictures of the horrendous carnage of bacteriological warfare? Must we live in a constant state of nervous apprehension? Will newspapers always blaze forth with headlines of recurring crises? Are we condemned to a Winchell-world existence, living under a sword of Damocles, ever in a mental state of foreboding in fear of impending imminent disaster? A wit might ask: Do you call this a life?

We would do well to reëxamine our ideas about security. Can security be bought by increased taxation, by increased pensions and insurance, by increased Marshall Plan aid to Europe, or by any other method short

of facing up to the issue? We must evaluate the tempo at which we live today, not only in transportation speeds, but also in the impact upon us of new and strange ideas, political, economic, social and moral. It is vain to expect the happy-go-lucky, carefree security of a buggy-ride when you are winging your way over the ocean in a four-engined airliner.

When Franklin said, "He that's secure is not safe," he was giving advice we should heed today. Where life offers high adventure, the big stakes are not for those who take no risks. Life has always been insecure. Columbus had little security when he headed his three ships west through the Gates of Hercules, yet he "sailed on". The signers of the Declaration of Independence were not penning their names to a social security application. Through their courage they found new freedom and its by-product, security. If America becomes preoccupied with security as its goal, that preoccupation may spell economic and military ruin, thus defeating the very security at which it aims. By dwelling on the idea of security we breed insecurity. We also become the ready prey of the political strong man who proffers security in return for total reliance on him. Germany tried that kind of "security".

Security is not a goal to be bought, nor even to be sought as a primary end in itself. Like happiness, it is a by-product of courageous living. Better that we should keep the eagle as a symbol of America than the ostrich who seeks security with its head in the sand. Living involves the unknown future with all its mysteries, its fears, all those vague unknowns that a wild imagination can always conjure up. The only inevitability in future history lies in the hearts and minds of the men who will make it. That man who has faith in himself can meet the future with fearless confidence—if he has the courage in him to do it. So can a nation! Our pioneers did it. So can Americans today. History will judge us as a nation not by whether we remained secure from injury, but by whether we achieved a worthy destiny for which we were willing to pay the price of the last full measure of devotion. To live courageously means to live dangerously, to take risks and to achieve. "Out of this nettle, danger, we pluck the flower, safety," said Shakespeare. Holmes urged us to love glory more than wallowing ease, to ride boldly at what is in front of us, and to pray, not for comfort, but for combat. No one has expressed it more inspiringly than he when he said:

> For high and dangerous action teaches us to believe as right beyond dispute things for which our doubting minds are slow to find words of proof. Out of heroism grows faith in the worth of heroism. The proof comes later and even may never come. Therefore I rejoice at every dangerous sport which I see pursued. The students at Heidelberg, with their sword-slashed faces, inspire me with sincere respect. I gaze with delight upon our polo players. If once in a while in our rough riding a neck is broken, I regard it, not as a waste, but as a price well paid for the breeding of a race fit for headship and command.

If America is to remain the land of the free, her goal cannot be security. If America is to achieve future greatness, her ideal must be, at all times, to be the home of the brave.

Editorial — From a Member of Our ADVISORY BOARD

■ *Robert N. Wilkin*

The resignation of Judge Robert N. Wilkin of Cleveland as a member of the Board of Editors of the JOURNAL resulted from the decision of his medical advisers that he must be relieved of the many responsibilities which have combined to bring on his illness. Judge Wilkin has also retired from full-time service as a judge of the United States District Court for the Northern District of Ohio, Eastern Division.

His condition was one of complete nervous exhaustion, coming on gradually for several years, but acute since early spring of the present year. As a result of enforced reduction in activity, the improvement in Judge Wilkin's condition has already reached the point where he expresses the intention and desire to make an occasional contribution to the JOURNAL. While the loss of his active participation as a member of the Board of Editors will deprive the JOURNAL of his attendance at meetings of the Board, we are reassured by the fact that in the future there will be articles bearing his name and editorials carrying his imprint.

The problem of world peace, uppermost in the minds of all Americans especially during the postwar period, is one which has been a source of interest and activity on his part more than any other. In his close association with Judge William L. Ransom, resulting from their work on the JOURNAL, the World Government proposal was the subject of a spirited difference of opinion between the two men. The fact that their views were so far apart on this fundamental problem was one of the means of bringing them together into a close personal friendship. It was a source of intense interest to their associates to witness the result of their exchange of ideas. Each was influenced by the other, with the result that after many occasions of personal discussion and much correspondence, the attitude of each was gradually modified and the two men came together in much the same viewpoint. Of the many admirers of Judge Ransom none was more devoted than his friend Bob Wilkin, and the admiration was mutual. The JOURNAL was the beneficiary of this friendship.

He is an idealist, but his philosophy is closely linked with the practical. In *The Eternal Lawyer,* a legal biography of Cicero widely read throughout the legal profession, he observes, "To the philosopher, thought

and theories are themselves sufficient; to the lawyer and statesman they are arid without vital application in the affairs of men".

Judge Wilkin possesses the qualifications which enabled him to measure up to the high standards rightfully set by the public for the federal judiciary. He is a man of the stature to which Cleveland has become accustomed in the members of the Federal Bench, and for the past ten years he has been one of the bright spots in the entire federal judiciary. Twice he had strong support for appointment to the Supreme Court of the United States. He is a recognized constitutional authority; his short addresses to new citizens taking the oath in his court have been classics in Americanism, and he has established a solid reputation for fairness, diligence, scholarship and the highest degree of integrity. Seldom does a community pay to a citizen during his lifetime a tribute and an appreciation of his attainments such as Judge Wilkin received in Cleveland upon the announcement of his retiring from full-time service on the Federal Bench.

In addition to his judicial duties, Judge Wilkin has devoted much time and energy to the civic betterment of the community and has taken a position of leadership, exerting at all times a great and liberal influence for good. He has written profusely and has spoken with profound eloquence, giving up the time which should have been devoted to rest. As to his leadership in the community during the war, editorial comment pointed out that "he was among the first and most eloquent to sense the real fundamental issue of the war and constantly sought to inspire and inform our people". Last April he received the Cleveland Chamber of Commerce award for public service. At the same time he was given a citation by the American Classical League for his contribution to the humanities through *The Eternal Lawyer*.

The readers of the JOURNAL realize what he has written in these columns under his own name, but only the members of the Board of Editors know the extent of his editorial contribution over the years and the reliance which has been placed upon him by the Editor-in-Chief. For the JOURNAL and the profession of the law in America it is fortunate that Robert N. Wilkin has been ordered by his doctors to take a complete rest and that he will be able in the future to contribute to the JOURNAL occasional articles and editorials of the character which our readers have in the past enjoyed so much.

As an able, diligent and conscientious judge, a civic minded member of the community, a person deeply devoted to the JOURNAL and to the legal profession, as a leading exponent of fundamental American principles, a scholar intensely interested in the welfare of his country and the peace of the world, an idealist, a philosopher, a person of deep intellectual powers, with keen insight, acute power of analysis and vivid expression in the written and spoken word, Judge Wilkin is the recipient of our profound respect and admiration. We extend to him our heartfelt wish that complete recovery may come at an early date and that there may be many years of useful service ahead.

HOWARD L. BARKDULL

Cleveland, Ohio

■ *A Christmas Message*

The earth has grown old with its burden of care,
But at Christmas it always is young;
The heart of the jewel burns lustrous and fair,
And its soul, full of music, breaks forth on the air
When the song of the angels is sung.

It is coming, Old Earth, it is coming tonight!
On the snowflakes which cover thy sod
The feet of the Christ-child fall gentle and white,
And the voice of the Christ-child tells out with delight
That mankind are the children of God.

—*Phillips Brooks*

Then let us stand quietly and listen,—and walk softly, once more guided by the Star of Bethlehem,—seeking to recapture the simple faith, the rapturous joy of this holy season, known only to little children,—and, like them, free our hearts from ill will, look with charity upon the frailties of those about us,—hoping that with patience and courage and tolerance we may so strengthen and refine our own characters that we can go forward again hopefully, with renewed confidence, to carry on in good spirit the never-ending crusade to preserve those things that are just and good in the world.

From the JOURNAL and its Board and its Staff, to all of you, best wishes for health and happiness in full measure over the years.

Merry Christmas and Happy New Year!

Review of Recent Supreme Court Decisions

COMMERCE

Fifteen-Month Delay in Shipping Gasoline Appropriated for Export Held To Interrupt Export Process So That Local Taxes May Be Levied Without Violation of Import-Export Clause of Constitution

■ *Joy Oil Company, Ltd.* v. *State Tax Commission of Michigan,* 337 U. S. 286, 93 L. ed. Adv. Ops. 1084, 69 S. Ct. 1075, 17 U. S. Law Week 4508. (No. 223, decided June 13, 1949.)

The Joy Oil Company purchased 1,500,000 gallons of gasoline from a refinery in Michigan for export to Canada. The gasoline was shipped by rail to Detroit and stored in tanks there awaiting shipping space to Canada. The railroad bills of lading were marked "For Export Only", and the Joy Oil Company furnished the refinery and railroad with prescribed forms certifying that the gasoline was purchased for export. Suitable shipping space was unavailable, and the gasoline remained at Detroit for fifteen months. The question presented is whether, under the Import-Export Clause of the Federal Constitution, a local ad valorem property tax could be levied upon the gasoline while it was being held at Detroit.

Speaking for the Court, Mr. Justice FRANKFURTER held that the circumstances that tended to establish petitioner's intent to export the gasoline and the fact that the gasoline was eventually exported were not enough, by themselves, to confer immunity from local taxation, and that the fifteen-month delay barred it.

The CHIEF JUSTICE, with whom Mr. Justice DOUGLAS and Mr. Justice JACKSON concurred, wrote a dissenting opinion. He declares that there is nothing in the record to indicate that petitioner ever deviated from the expressed intent to export the gasoline or that the delay was not due solely to lack of shipping space. He declares that the fact that the process of export has been actually commenced has always been considered the decisive factor, and that the majority opinion departs from this rule. (*Cf. Empresa Siderurgica* v. *County of Merced,* 337 U. S. 154, decided May 31, 1949. See 35 A.B.A.J. 929; November, 1949.) Y.

The case was argued by Clayton F. Jennings for the Joy Oil Company, and by Edmund E. Shepherd for the State Tax Commission.

EMINENT DOMAIN

Amount of Increase in Market Value of Vessel Requisitioned by Government That Is Due To Government's Special Need for Vessels Must Be Excluded from Compensation Awarded Owner Under Merchant Marine Act

■ *United States* v. *Cors,* 337 U. S. 325, 93 L. ed. Adv. Ops. 1073, 69 S. Ct. 1086, 17 U. S. Law Week 4502. (No. 132, decided June 13, 1949.)

Cors brought suit in the Court of Claims under Section 902 of the Merchant Marine Act of 1936, as amended, 46 U. S. C. § 1242, seeking to recover the balance of "just compensation" allegedly due him for the requisitioning in October, 1942, of his steam tug by the War Shipping Administration. The Administration determined that $9,000 was the "just compensation" for the tug, and offered that amount to Cors. The Court of Claims found that the fair market value was $15,500 and that Cors was entitled to that amount. The case turns upon Section 902(a) of the Act, which allows the owner of any vessel requisitioned by the Government "just compensation", "but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use". The Court of Claims found that, between September 8, 1939, when the President proclaimed the existence of a limited national emergency, and the date of taking, the market value was enhanced by various enumerated causes, including "the Government's need for vessels" and the "great increase in shipping and in harbor traffic which occurred during the period of the war".

Speaking for the Court, Mr. Justice DOUGLAS reversed. He holds that under the present facts the measure written into the Act and the judicial construction of "just compensation" are coterminous. He says that in the present case the market value of the commodity was enhanced by the special need that the Government had for it and that that value should be deducted. The findings of the Court of Claims were said, however, to be inadequate to fix the amount.

The CHIEF JUSTICE dissented without opinion.

Mr. Justice FRANKFURTER, joined by Mr. Justice JACKSON and Mr. Justice BURTON, delivered a dissenting opinion. He pointed to a finding by the Court of Claims that prior to the taking there was no reasonable prospect that the tug would be requisitioned and to the fact that the Government had got rid of her only seven months before with complete awareness that she was capable of being adequately reconditioned. Under the circumstances, he said, the market price of the tug could not have been enhanced by speculation at the expense of the Government's need, and, since any enhanced price due to shortage would be the same whether the shortage were induced by the expanded business of a commercial operator or by Government requisition, it was not true that such enhanced price was one created by the need necessitating the

Reviews in this issue by Rowland L. Young.

taking, as opposed to need of the tug operators. His view is that the decision below should be affirmed without reaching the constitutional issue raised by the Government's construction of Section 902 (a).

The case was argued by Oscar H. Davis for the United States, and by John Lord O'Brian for Cors.

LABOR LAW

Court of Appeals Refusal to Enforce NLRB Order on Ground That Uniform Belief of Union's Witnesses Indicated Bias of Trial Examiner Reversed, Supreme Court Finding No Such Uniform Belief

■ *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 337 U. S. 656, 69 St. Ct. 1283, 93 L. ed. Adv. Ops. 1159, 17 U. S. Law Week 4523. (No. 258, decided June 20, 1949.)

The National Labor Relations Board issued an order requiring the Pittsburgh Steamship Company to cease and desist from its antiunion conduct and to reinstate an employee found to have been wrongfully discharged for engaging in union activities. The Court of Appeals refused to enforce the order on the ground that the examiner's report, which the Board had adopted without substantial change, and the order itself, were invalidated by the "latent, pervasive and unremedied bias of the trial examiner". The court noted that this bias was apparent from the face of the record, and that "whenever there was a conflict of evidence, the witnesses for the [Company] were held to be untrustworthy and those for the union reliable". The court did not determine whether the evidence, if credited, would support the findings.

Speaking for the Supreme Court, Mr. Justice RUTLEDGE reversed. He says that there is no reason to suppose that an objective examiner could not resolve all factual conflicts in favor of one litigant, since the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next. Accordingly, he declares, "total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." "Indeed," he says, "careful scrutiny of the record belies the view that the trial examiner did in fact believe all union testimony or that he even believed the union version of every disputed factual issue." He held that the evidence was sufficient under the Wagner Act to support the findings, but the applicability of the Administrative Procedure Act and the Taft-Hartley Act, enacted after issuance of the Board's order and the Court of Appeals' decision, had not been considered in the proceedings below, and the cause was therefore remanded for a consideration of the effect of those statutes.

Mr. Justice JACKSON reserved opinion as to the sufficiency of the evidence under the Wagner Act. Y.

The case was argued by Robert L. Stern for the National Labor Relations Board, and by Nathan L. Miller for the Pittsburgh Steamship Company.

MONOPOLIES

Exclusive Supply Contracts Between Producer and Independent Retailers of Petroleum Products Where a Substantial Portion of Commerce Is Affected Held To Be Violation of Section 3 of Clayton Act Without Proof of Actual Diminishing of Competition

■ *Standard Oil Company of California* v. *United States*, 337 U. S. 293, 93 L. ed. Adv. Ops. 1089, 69 S. Ct. 1051, 17 U. S. Law Week 4510. (No. 279, decided June 13, 1949.)

The District Court enjoined the Standard Oil Company of California from enforcing or entering into exclusive supply contracts with any independent dealer in petroleum products or automobile accessories, requiring the dealer to purchase all his requirements from Standard. The Court held that such contracts violated Section 1 of the Sherman Act and Section 3 of the Clayton Act. The evidence indicated that Standard's combined sales in 1946 were 23 per cent of the total taxable gallonage sold in seven western states, Arizona, California, Idaho, Nevada, Oregon, Utah and Washington; that Standard's six leading competitors sold another 42.5 per cent of the total taxable gallonage in the area; that Standard had exclusive-dealer contracts with 16 per cent of the retail gasoline stations in the seven states; and that Standard's leading competitors employed similar exclusive-dealer agreements.

On appeal to the Supreme Court, Mr. Justice FRANKFURTER delivered the opinion of the Court affirming award of the injunction, holding that Standard's use of the contracts violated Section 3 of the Clayton Act, which reads: "It shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods . . . for use, consumption, or resale . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor . . . of the seller, *where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.*" (Italics supplied.) Noting that the contracts under consideration would be proscribed except for the qualifying clause italicized above, Justice FRANKFURTER notes that the District Court rested its decision on the fact that a substantial number of retail outlets and a substantial amount of products were affected by the contracts, on the theory that such quantitive substantiality would automatically result in substantial lessening of competition. After reviewing the eight previous Supreme Court decisions construing Section 3, he concludes that the District Court's theory is correct. "To interpret [§ 3] as requiring proof that competition has actually diminished would make its very explicitness a means of conferring immunity upon the practices which it singles out. Congress has authoritatively determined that those practices are detrimental where their effect may be to lessen competition", he declares. If a dealer observes his contract, he says, it cannot be gainsaid that whatever opportunity there might be for competing suppliers to attract his patronage is foreclosed.

In view of the ruling that the contracts violate the Clayton Act, he observes, it is unnecessary to consider whether a Sherman Act violation is also involved.

Mr. Justice JACKSON, joined by the CHIEF JUSTICE and Mr. Justice BURTON, wrote a dissenting opinion. He thinks that it was indispensable to the Government's case to establish actual or probable lessening of competition or tendency to creation of a monopoly, and that this requirement was not met. He would vacate the decree and direct the District Court to determine the effects of the device. He adds that he is not convinced that the exclusive supply contracts are a device for suppressing competition instead of a device for waging competition.

Mr. Justice DOUGLAS wrote a dissenting opinion in which he declares that the likely result of the Court's decision will be that the oil companies will command an increasingly larger share of both the wholesale and the retail markets. "The Court approves what the Anti-Trust Laws were designed to prevent," he asserts. "It helps remake America in the image of the cartels." Y.

The case was argued by John M. Hall for Standard Oil, and by Herbert A. Bergson for the United States.

WAR

District of Columbia Emergency Rent Act Does Not Apply to the United States as Landlord of Defense-Housing Project

■ *United States* v. *Wittek*, 337 U. S. 346, 93 L. ed. Adv. Ops. 1106, 69 S. Ct. 1108, 17 U. S. Law Week 4479. (No. 473, decided June 13, 1949.)

Wittek was a tenant in a defense housing project in the District of Columbia owned by the Federal Government. He refused to pay a rent increase or to vacate the premises. The United States Court of Appeals for the District of Columbia reversed an eviction order of the Municipal Court on the ground that the United States, as landlord, had not complied with the District of Columbia Emergency Rent Act. 171 F. (2d) 8; see 34 A.B.A.J. 1051, November, 1948. The question before the Supreme Court was whether the United States was a "landlord" within the meaning of the Act.

Mr. Justice BURTON, speaking for a unanimous Court, held that the Act did not apply to the Federal Government. His opinion declares that if the Act applies to defense housing, it apparently also applies to government-owned low-cost housing projects, a result "inconceivable" in view of the purpose of the low-cost housing projects. The District rent act contains no express reference to the United States as landlord, the opinion continues, nor did government-owned defense housing need new rent control when the Act was passed since the rental policy in the housing projects was placed under the control of agencies having the same powers and duties as the Federal Works Administrator under the Lanham Act. "A general statute imposing restrictions does not impose them upon the Government itself without a clear expression or implication to that effect," the opinion declares. Moreover, the National Emergency Price Control Act, passed only two months after the District Rent Act, expressly included the United States as a "person", thus lending support to the view that when Congress sought to include the Government in such legislation, it expressly said so. And, the opinion notes, the District Administrator of Rent took no part in this proceeding, and had never attempted to assert jurisdiction over the United States as landlord. Y.

The case was argued by A. Devitt Vanech for the United States, and by Ward B. McCarthy for Wittek.

School for Young Lawyers

OVER THIRTY LAWYERS from twenty eastern law offices and business firms made up the faculty of a two-day "School for Young Lawyers" which opened November 10 at the Harvard Law School.

Sponsored by the Harvard Law School Forum, a student organization at the Harvard Law School, this School for Young Lawyers offered two general lectures and twenty workshop discussions on various phases of the practice of law. The purpose of the affair, which is a new experiment in legal education, is to acquaint students and young lawyers with the opportunities and problems of the law, Richard A. Holman, Forum president said.

Among the seminar topics discussed were large, medium, small, and individual New York law practices, real estate law, trusts and estate planning, corporation law, insurance, labor and tax law, large and small town practices, the lawyer in business, government and politics, and trial law.

General lectures opened and closed the School's program. Professor Edmund M. Morgan, Royall Professor of Law at Harvard, opened the school with a talk on legal ethics. At the closing session, Judge Samuel Leibowitz, a former defense attorney and present Judge of the New York King's County Court, spoke on trial techniques.

Boston lawyers on the program included: John Barker, Jr., George R. Blodgett, Ralph G. Boyd, Charles A. Coolidge, Roger W. Cutler, Jr., Thomas H. Eliot, George H. Foley, Henry E. Foley, John B. Hopkins, Robert I. Hunneman, Horace P. Moulton, Isadore H. Y. Muchnick, Edward O. Proctor, Stuart C. Rand, Robert M. Segal, and Mayo A. Shattuck.

New York lawyers were Loftus E. Becker, Jesse Freidin, Phil E. Gilbert, Jr., Leslie P. Hemry, Dan G. Judge, J. Edward Lumbard, Jr., Julius Paull, John F. Reddy, Jr., Benjamin R. Shute and Harris B. Steinberg.

John M. Dry of Cambridge, Osmer C. Fitts of Brattleboro, Vermont, Vance N. Kirby of Washington D. C. and Frank M. Coffin of Lewiston, Maine, also attended.

Courts, Departments and Agencies

E. J. Dimock • EDITOR-IN-CHARGE Lydia A. G. Stratton • ASSISTANT

Aviation . . . limitation of liability . . . deliberate violation of Civil Air Regulation as to altitude constitutes "willful misconduct" within terms of exception to Warsaw Convention limitation.

▪ *American Airlines, Inc.* v. *Ulen*, C.A.,D.C., September 26, 1949, Clark, J.

Plaintiff, who was partially disabled as a result of injuries sustained in a crash of defendant's plane while en route to Mexico City, Mexico, sued for $275,500 in damages, alleging negligence on the part of defendant's agents in carelessly planning and approving the flight and in unskillfully operating the plane. The carrier denied any negligence and, subsequent to plaintiff's motions for summary judgment, filed an amended answer with the additional defense that plaintiff was a passenger in international transportation and hence her total recovery, if any, was limited by the provisions of the Warsaw Convention to the sum of $8,291.87. On the basis of the pleadings and the carrier's answers to a set of fifty-five interrogatories, the court granted the motions for summary judgment in plaintiff's favor. A verdict for plaintiff was returned by the jury in the amount of $25,000.

Affirming the judgment on appeal, the Court ruled that, although the issue had not previously been decided in its jurisdiction, interrogatories and answers thereto could properly be used as a basis for the awarding of summary judgment. The Court found that the answers undeniably showed negligence on the part of the carrier.

As to the amount of damages, the Court considered it unnecessary to determine the applicability of the Warsaw Convention to the flight since, even if the Convention covered the particular trip, the limitation of liability provision was by the terms of Article 25 (1) inapplicable in the case of a carrier's "wilful misconduct". Such misconduct was deemed to exist in view of the carrier's deliberate violation of Civil Air Regulation 61.7401 prohibiting flight at less than 1000 feet above the highest obstacle located within a horizontal distance of five miles from the center of the course intended to be flown. The Court rejected the carrier's contention that properly translated the original French Article 25 (1) precluded limited liability only where the carrier was guilty of "fraud" or "deceit", rather than willful misconduct.

Constitutional Law . . . personal, civil and political rights . . . Maryland's provision for scholarship training in nursing at Tennessee medical college under Southern Regional Compact held to discharge state's obligation to provide substantially equal educational facilities to Negro students.

▪ *McCready* v. *Byrd et al.*, Baltimore City Ct., October 10, 1949, Smith. Ch.J.

The Court in this proceeding denied a petition for a writ of mandamus to compel the admission of petitioner, a Negro, to the School of Nursing of the University of Maryland, and ruled that the state, in offering petitioner scholarship training at the Meharry Medical College in Nashville, Tennessee, under the Southern Regional Compact, had discharged its obligation to provide substantially equal educational facilities to Negro students and was not guilty of any discrimination. The training in nursing offered at the Meharry Medical College was said to be "equal, if not superior", to that available at the University of Maryland School of Nursing. Stating in an oral opinion that the Court considered itself bound by existing decisions and not by "any reasonable tendency rules", Chief Judge Smith asserted that in fields of education other than the study of law there had been no condemnation by the United States Supreme Court of the use of the scholarship exchange compact, which allows one state to send students to another to receive training which is not available in the first state. The ruling of the Maryland Court of Appeals in another case admitting Negroes to the University of Maryland Law School, on the ground, *inter alia*, that legal training in the state where the student proposed to practice was preferable to such training elsewhere, was deemed inapplicable to training in nursing.

Courts . . . inherent powers . . . Massachusetts Supreme Judicial Court's rule prohibiting practice as attorney on criminal side of any court in the Commonwealth by any justice of a district court held valid exercise of Court's judicial power and to preclude giving of advice by a justice even though without court appearance.

▪ *Collins* v. *Godfrey*, Mass. Supreme Jud. Ct., September 15, 1949, Qua, Ch.J.

In an action by plaintiff attorney, who was also a special justice of the District Court of Springfield, to recover for legal services in the nature of advice given in his office to defendant's intestate regarding a criminal complaint pending against him in the same District Court, defendant

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EDITOR'S NOTE: The omission of a citation to the United States Law Week or to the appropriate official or unofficial reports in any instance does not mean that the subject matter has not been digested or reported in those publications.

contended that the services were illegally rendered in violation of the Massachusetts Supreme Judicial Court's rule prohibiting any justice, special justice, clerk or assistant clerk of a district court from practicing "as an attorney on the criminal side of any court in the Commonwealth."

The Court denied recovery and upheld the promulgation of the rule as a proper exercise of the Court's inherent judicial powers relative to the practice of law. Pointing out that many persons were led to believe that there were peculiar advantages in employing special justices to defend or advise them, the Court maintained that the judicial department had the power "to proceed in a sensible way to eradicate the evil by laying down a rule for future guidance without prosecuting any individual." The Court rejected plaintiff's contention that the rule did not preclude the giving of advice in his office without a court appearance, and stated that the giving of legal advice and office practice in general were included within the practice of law.

Eminent Domain . . . just compensation . . . in action by United States condemning land for hydroelectric power project, condemnee held entitled to compensation measured by value of land for power-site use.

■ *U. S.* v. *1532.63 Acres of Land in McCormick County,* and *Savannah River Electric Co., et. al.,* October 1, 1949, Wyche, J.

The United States sued to condemn, for use in a hydroelectric power project located on a navigable river, a tract of land which had been assembled by defendant power company for use in a similar hydroelectric project. (Defendant's application for a federal license for its project was rejected by the Federal Power Commission after adoption of the federal project.) The principal question was the measure of damages. This the United States raised by motion to strike allegations of the answer.

The Court, in denying the motion to strike, agreed with defendant that it was entitled to the value of the land for the highest use, in this case, power site development, including elements of value created by integration of the tract. The instant case, dealing with the condemnation of fast land, was distinguished from cases stemming from *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, which established the principle that a riparian owner has no private property right in the flowing water of a navigable waterway and gave rise to the doctrine that structures in a navigable waterway, unless irrevocably licensed by the Federal Government, may be removed or taken over by the United States without payment of compensation. Rather, the Court maintained, defendant in the instant case claimed no compensation for the "water power capacity" of the river, but only asserted a right to have its holdings of fast land valued in the light of their adaptability to water power development, including such factors as location and integration of the tract. Allowance of compensation in such a case was said to be consonant with the policy to encourage rather than inhibit the water power development of the nation.

Husband and Wife . . . divorce . . . second wife of husband whose first wife obtained Florida divorce in proceeding in which both appeared is not precluded by recital of residence in divorce decree from attacking its validity in New York annulment on ground that first wife resided elsewhere.

■ *De Marigny* v. *De Marigny,* N. Y. Supreme Ct., Trial Term, Part XVII, N. Y. County, October 4, 1949, Steuer, J.

Plaintiff, the second wife of defendant husband whose first wife obtained a Florida divorce in a proceeding in which both parties appeared, brought an annulment action in New York on the ground that the divorce decree was a nullity for lack of jurisdiction. The Court, finding that the first wife indisputably misrepresented the facts as to Florida residence, ruled that plaintiff as a third party was not barred by the recitals of residence in the judgment from collaterally attacking the validity of the divorce.

(See also *Old Colony Trust Co.* v. *Porter,* Mass. Supreme Jud. Ct., September 16, 1949, Qua, Ch.J., in which the Court held that representatives of the second wife of a husband who obtained a divorce from his first wife in a Massachusetts proceeding in which both appeared might not maintain a direct attack on the divorce in a Massachusetts court but was entitled to attack the divorce collaterally because of a jurisdictional defect based on failure to satisfy the statutory requirement of a five-year residence by plaintiff.)

Insurance . . . life insurance . . . omission of war risk exclusion does not nullify aviation exclusion even where death is due to military service.

■ *Wilmington Trust Company* v. *Mutual Life Insurance Co. of N. Y.,* C.A. 3d, September 21, 1949, Biggs, Ch.J. (Digested in 18 U. S. Law Week 2135, September 27, 1949.)

Plaintiff's decedent took out a life insurance policy which contained a rider restricting defendant's liability to the reserve value of the policy, plus dividends, if death resulted from "operating or riding in any kind of aircraft, whether as a passenger or otherwise". The policy also contained a clause stating that it was "free from restrictions as to occupation". At the time the policy was issued in 1935, the insured owned his own plane and piloted planes and gliders. During the war, while serving as a "Special Civilian Assistant" to the Army Air Corps, the insured died as the result of a glider accident.

Plaintiff, as executor for the insured, sued to recover full face value of the policy, rather than mere reserve value plus dividends. It contended that a Delaware statute making life insurance policies incontestable after a stated period operated to prevent exclusion of the aviation risk; that the insured was engaged in occupational flying, and hence entitled to full recovery since the policy

did not purport to restrict occupation; and that the aviation riders were not intended to extend to wartime military flights.

The Court, after a review of the decided cases from other jurisdictions, concluded that an incontestability statute such as that of Delaware operated only to prevent the insurer from contesting, after expiration of the statutory period, the validity of the policy and did not compel the insurer to assume risks that the policy was phrased to avoid.

The Court was unable to find ambiguity in the aviation rider and the occupations clause, read together, and concluded that the aviation rider, by the natural force of its words, excluded coverage for occupational flying.

Stating that the question was one of first impression, the Court expressed its inability to accept plaintiff's contention that the absence of a military service restriction in the coverage of the policy meant that the aviation risk clause did not limit coverage where the insured was engaged in wartime military flying.

Insurance . . . automobile liability insurance . . . insurer under policy excepting intentional injuries not bound by finding of negligence in suit against insured despite agreement to defend suits alleging negligence.

■ *Farm Bureau Mutual Automobile Insurance Co.* v. *Hammer*, C.A. 4th, October 3, 1949, Soper, C. J. (Digested in 18 U. S. Law Week 2168, October 18, 1949).

Plaintiff insurer sought a declaratory judgment that an automobile liability policy did not cover damages suffered when the insured intentionally caused a collision, for which conduct he had been convicted of second degree murder. Defendant injured persons and personal representatives of the dead held unsatisfied judgments against defendant insured, obtained in civil actions based upon negligence; the insured had not defended the civil actions, and the insurer's attorney, who had previously entered appearance for the insured, withdrew with leave of court after conviction of insured and before trial. On these facts, the District Court granted defendants' motion for summary judgment and dismissed the insurer's complaint. This decision was reversed on appeal.

The Court disposed readily of the judgment creditors' contentions based on the terms of the policy and the applicable Virginia statutes. The provision of the policy denying coverage for assault and battery committed by the insured was held to preclude coverage for intentional automobile collision. The Court indicated that, had the policy been issued to enable the insured to satisfy the Virginia financial responsibility law, the clause exempting assaults would have yielded to a construction favoring the injured party, to whom vehicular assault is an "accident". Since the policy was, however, obtained voluntarily by the insured and had not been certified as proof of financial responsibility under the Virginia statute, the statute's terms were deemed controlling.

The Court found more difficult the claim that the insurer was estopped by the judgment to deny that the injuries and deaths were due to negligence. It cited with approval Comment (g) under § 107 (a) of the *Restatement of the Law of Judgments* to the effect that an indemnitor who has been given notice and opportunity to defend is bound by the judgment only as to issues relevant to the proceeding. In answer to the argument that the insurer was here bound by the terms of the policy to defend groundless actions alleging negligent injuries and that therefore it was bound by the result of such an action, the Court said that the insured was not bound to defend where it was not qualified to undertake the defense and where the disqualification was due to the insured's own conduct. Here, it was said, it was impossible for the insurer to defend and at the same time protect its own interests since a showing of intent to injure would establish the insured's liability to an even greater extent than that claimed in the complaints.

Parker, C. J., dissented on the ground that the insured was estopped by the judgments in the civil actions. After pointing out that the decision below was in accord with all of the four decided cases dealing with the point, he observed: "The fact that the company could not assert in the original case that the injury was not negligent but intentional without prejudicing the defense of that case means merely that the defense which it had undertaken was difficult."

Monopolies . . . insurance . . . rate-fixing activities of bureau of casualty underwriters and Arkansas casualty insurance companies, to extent authorized and regulated by state laws, do not violate Sherman Act . . . provisions of McCarran-Ferguson Act exempting insurance where regulated by state law held constitutional.

■ *North Little Rock Transportation Co., Inc.* v. *Casualty Reciprocal Exchange, et al.*, U.S.D.C., E.D. Ark., September 8, 1949. Trimble, J.

Plaintiff taxicab company sued an insurance rating bureau, automobile liability insurers presently and formerly serving plaintiff, and forty-eight other casualty insurance companies doing business in Arkansas, after the following developments: In May, 1948, plaintiff's former insurer cancelled plaintiff's liability policy because of an excessive loss-to-premium ratio. Plaintiff was thereafter able to obtain insurance only by applying to the Arkansas Automobile Assigned Risk Plan, a coöperative undertaking organized pursuant to statutory authority, whereby insurers doing business in Arkansas each accepted an equitable number of risks unable to obtain insurance elsewhere. Plaintiff was assigned to its present insurer under the Plan. The insurer issued a policy for a premium subsequently determined by the rating bureau in accordance with a rating plan approved by the Arkansas Insurance Commissioner and based on plaintiff's previous accident experience. Upon threat of cancellation plaintiff paid the premium and brought this

action for treble damages and an injunction. Plaintiff alleged that the conduct of defendants—and the Arkansas statute to the extent that it authorized such conduct—violated § 1 of the Sherman Act, and that the McCarran-Ferguson Act[1] (15 USC §§ 1011 *et seq.*), insofar as it purported to authorize the Arkansas regulatory scheme, was unconstitutional because Congress could not delegate to individual states power to legislate within the Commerce Clause, or suspend general laws except under the war powers.

The Court, proceeding under Rule 56, Fed. Rules Civ. Proc., gave summary judgment for defendants.

As to plaintiff's Sherman Act contention, the Court held that the Act was not violated by conduct authorized and regulated by state statute; moreover, the McCarran-Ferguson Act specifically exempted insurance, to the extent regulated by state law, from the Sherman Act. The McCarran-Ferguson Act, insofar as attacked by plaintiff, was construed as "a proper division of power between the United States and [the] several States" rather than a delegation of legislative power, and was deemed constitutional on the authority of *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408 (tax on insurance premiums).

Municipal Corporations . . . zoning . . . ordinance requiring two-acre plots for residential building purposes held void as lacking substantial relation to public health, safety and morals.

■ *Dilliard* v. *Village of North Hills*, N. Y. Supreme Ct., Nassau County, August 17, 1949, Hill, J.

In an action to declare invalid a zoning ordinance adopted by the board of trustees of defendant Village requiring two-acre plots for residential building purposes, plaintiffs contended, *inter alia*, that the ordinance restrictions bore no substantial relation to public health, safety and morals as required by law. The average residential plots in the Village, which encompassed some 1500 acres in area, averaged fifty acres. In the past few years many homes had been built around the perimeter of the Village on plots averaging 10,000 square feet in area.

The Court, pointing out that no similar case in the federal or state courts had been found, stated that every zoning regulation must come within the rule that it have some substantial relation to public health, safety and morals and held this one unconstitutional and void as lacking any such relation. Reference was made to the statements of Bassett, noted zoning authority, that such factors as fire risk, light and sunlight, circulation of air, annoyance from noise, and danger of contagion were to be considered in density regulations, and that "three families to the acre is safe." The instant ordinance was characterized as an attempt at most to protect the large estates in the Village.

Limitation of Actions . . . accrual of right . . . statute of limitations applicable to suit on claim submitted to War Shipping Administration for just compensation arising out of Government's requisition of vessel runs from date of final determination by WSA rather than date of requisition.

■ *Schaeffer & Robbins* v. *U. S.*, U. S. Ct. Cls., October 3, 1949, Jones, Ch. J.

Upon the War Shipping Administration's requisition on August 11, 1942, of plaintiff's yacht and its equipment, plaintiffs filed claims with the Administration for compensation in the amount of $30,000. The WSA determined that plaintiffs were entitled to $7,000. In June, 1944, 75 per cent of the amount determined, or $5,250, was paid plaintiffs. On April 4, 1949, plaintiffs sued in the Court of Claims for the difference between the amount received and $30,000 as the alleged value at the time of taking, pursuant to the Merchant Marine Act, 46 USC § 1242 (d), which provides that the owner of a requisitioned vessel is to be paid three-fourths of the amount determined by the Administration and, where such amount is deemed unsatisfactory, is thereafter "entitled to sue the United States to recover" the difference between this amount and that which would be just compensation. Defendants demurred on the ground that the Court lacked jurisdiction under 28 USC § 262 since the six-year period of limitations had elapsed between the date of requisition and the filing of the suit. The demurrer was overruled.

The Court ruled that the statute of limitations began to run only after the date of final determination by the WSA of the just compensation due plaintiffs since the Merchant Marine Act, under which both parties elected to proceed, specifically accorded plaintiffs an affirmative right to sue the United States upon compliance with the conditions laid down in the Act, and that right to sue did not accrue until the conditions were complied with. "Regardless of whether plaintiffs could or could not have, by ignoring the statute, pursued another remedy," the Court stated, "certainly plaintiffs should not be penalized for following it."

Limitation of Actions . . . conflict of laws . . . action brought in District of Columbia under wrongful death act of Nebraska is governed by Nebraska's two-year statute of limitations rather than one-year limitation of District.

■ *Lewis* v. *Reconstruction Finance Corp.*, C.A., D.C., October 17, 1949, Proctor, J.

The question presented was whether an action brought in the District of Columbia under the wrongful death act of Nebraska was subject to Nebraska's two-year statute of limitations or the one-year limitation imposed by the statute creating such a right of action for deaths caused in the District. Suit was filed twenty-two months after the fatality, and defendant, invoking the local limitation as a bar, moved for judgment on the pleadings. The trial judge granted the motion on the theory that the time limitation prescribed by a statute of the state where an action is brought creating a right of action constitutes a declaration of

1. See Senator McCarran's article, 34 A.B.A.J. 539; July, 1948.

public policy by the enacting state against the institution of any similar suits in its courts beyond the period prescribed, and prevails over any demands of comity.

Reversing the judgment below, the Court held the instant action maintainable since the District statute and its limitations were confined to deaths resulting from injuries suffered within the District, and on the further ground that the difference in the periods of limitation did not manifest any conflict of policy as to underlying purpose between the two jurisdictions and, therefore, the law of the state where the fatality occurred should govern. The Court subscribed to the view that, since the liability and the remedy were created by the same statute, limitation of the remedy was to be treated as a limitation of the right.

Public Officers . . . qualifications . . . New Jersey's loyalty oath declared unconstitutional as unauthorized imposition of terms in addition to those prescribed by Constitution.

■ *Imbrie et al.* v. *Marsh et al.*, N. J. Superior Ct., App. Div., October 19, 1949, Bigelow, J.

Reversing a lower court ruling, the Court held New Jersey's loyalty oath requirement unconstitutional insofar as it applied to the governor, members of the state legislature and candidates for those offices. The oath (Chapters 21 to 25 of the Laws of 1949) required candidates for public office, elected officials and state employees to swear that they did not believe in and did not belong to any organization advocating the forcible overthrow of the United States or state Government.

The Court ruled that the New Jersey Constitution, by prescribing a form of oath, impliedly prohibited the imposition of additional provisions. Statutory oaths of allegiance were distinguished on the ground that they amounted to no more than an affirmation of a duty owed by all citizens.

United States . . . Federal Tort Claims Act . . . waiver of sovereign immunity in Federal Tort Claims Act authorizes original suit against United States but is inapplicable to counterclaim asserted by defendant in action brought by Government.

■ *U. S.* v. *Pittsley*, U. S. D. C., Mass., September 13, 1949, Sweeney, Ch. J. (Digested in 18 U. S. Law Week 2172, October 18, 1949.)

In dismissing a counterclaim the Court ruled that the provision in the Federal Tort Claims Act for waiver of sovereign immunity authorizes original suit against the United States but is inapplicable to a counterclaim asserted by defendant in an action brought by the Government. The Court stated that counterclaims cannot be maintained against the sovereign unless they are predicated on claims to which the United States has given its statutory consent to be sued in the court where the claim is interposed and unless this consent includes a counterclaim, as distinguished from an original action, against the sovereign. The decision was said to be limited to the situation where only an original suit had been authorized and filed and defendant had attempted to file a counterclaim instead of an original suit, and was said not to be intended to cover a situation where an offset had been filed against a suit brought by the Government.

War . . . Trading with the Enemy Act . . . administrative law . . . Administrative Procedure Act . . . claimant, who married enemy husband in enemy country under agreement that United States should be marital domicile, did not acquire his domicile in enemy country and was therefore not "resident within the territory" of an enemy nation . . . review under Administrative Procedure Act of action of Alien Property Custodian denied where "statutes preclude judicial review" and "agency action is by law committed to agency discretion".

■ *McGrath* v. *Zander*, C. A., D. C., October 10, 1949, Proctor, J.

Plaintiff Jane Zander, a native-born American citizen, was stranded in Germany upon the outbreak of hostilities in September, 1939, and thereafter married a German citizen. She returned to the United States in May, 1946, with the assistance of American officials. Her husband had been taken prisoner while serving with the German army in Africa and had been sent to the United States. He was returned to Germany in 1947 and discharged. Thereupon he returned to the United States upon an immigration visa and joined his wife in her home in New Jersey where they now live and where he is seeking American citizenship.

Plaintiff filed a claim with the Office of Alien Property for the return of certain property inherited from her American grandfather which had been seized by the Alien Property Custodian. Her claim was denied.

She then brought this suit setting forth two counts, the first based on §9 of the Trading with the Enemy Act (50 USC War App., §§ 1 *et seq.*) which permits suit after filing a notice of claim with the Custodian, and the second seeking under § 10 (a) of the Administrative Procedure Act to review the proceedings before the Custodian. The District Court did not pass upon the first count but granted relief under the second, holding that the Custodian's action was a proper subject for review under the Administrative Procedure Act and that plaintiff's status as a citizen of the United States (which was the critical question under that count) remained unaltered by her marriage to a German citizen (See review *sub nom. Zander* v. *Clark*, 35 A.B.A.J. 63; January, 1949).

The Court of Appeals held that the review provided by the Administrative Procedure Act was inapplicable since §10 thereof excepted from such review rulings where "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion" and here both exceptions stood as bars. Hence, the District Court's judgment on the second count was vacated.

The Court further held, however, that plaintiff was entitled to recover upon the first count. Section 9 (a) of the Trading with the Enemy Act requires a court to return the

property if the claimant be not an "enemy or ally of enemy", defined by §2 as including "any individual . . . of any nationality, resident within the territory . . . of any nation with which the United States is at war". The Court stated that the question of citizenship was not directly involved and that the decisive question was "was appellee 'resident within Germany?' ". The Court held that she was not. The rule that makes the residence of the wife follow that of the husband was said to amount to no more than a prima facie presumption. Here she had planned her marriage with Zander upon the condition and understanding that their matrimonial domicile should be established permanently in the United States. The Court held, therefore, that she had never lost her American domicile and was accordingly entitled to recover under count one. Since nothing was left but a proper application of the law, the Court directed entry of judgment under the first count for the sum of money withheld.

Further Proceedings in Cases Reported in this Division.

■ The following action has been taken in the United States Supreme Court:

PROBABLE JURISDICTION NOTED, October 17, 1949: *U. S.* v. *Shoreline Cooperative Apartments, Inc., et al.*—War (35 A.B.A.J. 854; October, 1949).

CERTIORARI GRANTED, October 10, 1949: *Civil Aeronautics Board* v. *State Airlines, Inc.; State Airlines, Inc.* v. *Civil Aeronautics Board; Piedmont Aviation, Inc.* v. *State Airlines, Inc.*—Administrative Law (35 A.B.A.J. 498; June, 1949).

CERTIORARI GRANTED, October 17, 1949: *Regents of the University System of Georgia* v. *Carroll et al.*—Licenses (35 A.B.A.J. 64; January, 1949).

CERTIORARI GRANTED, October 24, 1949: *Commodities Trading Corp., et al.* v. *U. S.; U. S.* v. *Commodities Trading Corp., et al.*—Eminent Domain (35 A.B.A.J. 500; June, 1949); *U. S.* v. *Morton Salt Co.*—Commerce (33 A.B.A.J. 822, August, 1947; 34 A.B.A.J. 241, 609, March, July, 1948).

CERTIORARI GRANTED AND JUDGMENT REVERSED, *per curiam*, October 17, 1949: *SEC et al.* v. *Otis & Co.*—Administrative Law (35 A.B.A.J. 674; August, 1949).

CERTIORARI DENIED, October 17, 1949: *Hall* v. *U. S.*—Contempt (35 A.B.A.J. 850; October, 1949); *Green* v. *U. S.*—Contempt (35 A.B.A.J. 850; October, 1949); *Winston* v. *U. S.*—Contempt (35 A.B.A.J. 850; October, 1949).

CERTIORARI DENIED, October 24, 1949: *City of Dallas* v. *Rentzel*—Administrative Law (35 A.B.A.J. 329; April, 1949); *Lapides* v. *McGrath*—Citizens (35 A.B.A.J. 675; August, 1949); *News Syndicate Co., Inc.* v. *Mattox*—Libel and Slander (35 A.B.A.J. 422; May, 1949); *S. C. Johnson & Sons, Inc.* v. *Johnson et al.*—Trade-Marks, Trade Names and Unfair Competition (35 A.B.A.J. 678; August, 1949).

■ The following action has been taken by the United States Court of Appeals for the Second Circuit:

REVERSED AND REMANDED, September 30, 1949: *U. S. ex rel. Pirinsky* v. *Shaughnessy*—Aliens (35 A.B.A.J. 933; November, 1949).

■ The United States Court of Appeals for the District of Columbia, on October 10, 1949, in a decision which is reviewed *supra*, remanded the case with direction to vacate the present judgment in favor of appellee on the second count and enter a judgment in favor of appellee on the first count for the same amount: *McGrath* v. *Zander*—Citizens (35 A.B.A.J. 63; January, 1949).

■ Attorney General J. Howard McGrath announced, on October 26, 1949, that the Department of Justice will not seek review by the United States Supreme Court of *Acheson* v. *Murakami et al.*—Citizens (35 A.B.A.J. 934; November, 1949).

Nominating Petition

Vermont

The undersigned hereby nominate Osmer C. Fitts, of Brattleboro, for the office of State Delegate for and from Vermont to be elected in 1950 for a three-year term beginning at the adjournment of the 1950 Annual Meeting:

Walter G. Nelson, Jr., Joseph W. Foti and George L. Hunt, of Montpelier;

Deane C. Davis, of Barre;

Charles F. Ryan, James T. Haugh, R. Clarke Smith, Angelo J. Spero, Martin J. Delliveneri, Bernard R. Dick, Harold I. O'Brien, James S. Abatiell and Robinson E. Keyes, of Rutland;

Asa S. Bloomer, of West Rutland;

A. Pearley Feen, Philip W. Hunt, William H. Edmunds, Thomas M. Reeves and David W. Yandell, of Burlington;

Albert W. Coffrin, of Essex Junction;

Robert T. Gannett II, of Putney;

Paul N. Olson, Harrie B. Chase, Ralph Chapman and F. Elliott Barber, Jr., of Brattleboro.

THE DEVELOPMENT OF INTERNATIONAL LAW

Louis B. Sohn · Editor-in-Charge

■ The International Court of Justice after a brief period of semi-activity, is now confronted with a full calendar. The following cases have been submitted for its decision:

1. United Kingdom—Albania: Assessment of damages due by Albania to the United Kingdom under a previous decision of the International Court of Justice holding Albania responsible for explosions in the Corfu Channel.

2. United Kingdom—Norway: A British claim that a delimitation of Norwegian territorial waters is contrary to international law.

3. France—Egypt: A French claim concerning the detention by Egypt of French nationals of Jewish faith and the sequestration of their property.

4. Colombia—Peru: A Colombian request that Peru should give safe-conduct to a Peruvian national who was granted asylum in the Colombian Embassy in Peru.

5. Admission to membership in the United Nations: A request for an advisory opinion, submitted by the General Assembly of the United Nations, concerning an Argentine proposal to admit certain states despite Soviet vetoes in the Security Council.

In addition, the General Assembly of the United Nations has requested the Court to give an advisory opinion on the interpretation of a clause on pacific settlement of disputes contained in the peace treaties with Bulgaria, Hungary and Yugoslavia. The main questions relate to the definition of "dispute" and the possibility of appointing an arbitral tribunal without the coöperation of a party to the dispute. This month's column gives the background of the Assembly's request; the forthcoming opinion on the subject will constitute an important step in development of the law of pacific settlement.

Settlement of Disputes Under the Recent Peace Treaties

■ On October 22, 1949, the General Assembly of the United Nations asked the International Court of Justice for an advisory opinion on four questions relating to the settlement of disputes under the peace treaties concluded in 1947 with Hungary, Rumania and Bulgaria. Forty-seven members of the Assembly voted for the resolution and only the five members of the Soviet bloc voted against it. Seven countries, including Yugoslavia, abstained.

The debate in the General Assembly centered mostly on the question whether any human rights have been actually violated by the three Balkan countries and on the closely connected question whether any action on the subject by the General Assembly constitutes an unlawful intervention in matters that are essentially within the domestic jurisdiction of these countries. Both the preamble and the first two operative clauses of the resolution adopted by the General Assembly make it clear that the United Nations has the right under the Charter to consider the observance by the three countries of human rights and fundamental freedoms, and the General Assembly expressed its continuing interest in and its increased concern about the state of affairs prevailing in Bulgaria, Hungary and Rumania in this respect.

The four questions actually referred to the Court are much more restricted; they do not deal with this basic issue of human rights but with a really different problem—the extent of obligations of the three countries to settle disputes that have arisen under the peace treaties with them, regardless of the subject matter of a particular dispute. The main provision on the subject is contained in Article 36 of the treaty of peace with Bulgaria and in identical articles of the other treaties. It reads as follows:

> 1. Except where another procedure is specifically provided under any Article of the present Treaty, any dispute concerning the interpretation or execution of the Treaty, which is not settled by direct diplomatic negotiations, shall be referred to the Three Heads of Mission acting under Article 35, except that in this case the Heads of Mission will not be restricted by the time limit provided in that Article. Any such dispute not resolved by them within a period of two months shall, unless the parties to the dispute agree upon other means of settlement, be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country. Should the two parties fail to agree within a period of one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment.
>
> 2. The decision of the majority of the members of the Commission shall be the decision of the Commission, and shall be accepted by the parties as definitive and binding.

The United States and the United Kingdom in parallel notes charged the three Balkan states in April, 1942, with violations of provisions of the peace treaties obligating them to secure to their peoples the enjoyment of human rights and fundamental freedoms. The three Balkan governments denied that they had violated any treaty provisions and protested against the tendency of Western Powers to interfere in their domestic affairs. The Western Powers, considering that a dispute had arisen concerning the interpretation and execution of the treaties of peace, re-

ferred the dispute for consideration to the three heads of diplomatic missions – of the Soviet Union, the United States and the United Kingdom—in the respective capitals. But the Soviet government refused to authorize its representatives to meet with their American and British colleagues, contending that the three Balkan countries have fulfilled their obligations and that the Western Powers were trying "to convert this question artificially into a subject of dispute" for the purpose of "exerting pressure on their internal policy."

After two months elapsed since the Western attempt to submit the case to the heads of the diplomatic missions, the Western Powers invoked the second sentence of the above-cited article of the peace treaties and requested the Balkan governments to join them in the appointment of the special commissions provided for in that provision. The Balkan governments replied that a commission can be established only in case of a "dispute" concerning the interpretation of the treaties, and there can be no question about such a dispute, because they have fulfilled their obligations under the treaties. The Western Powers—their reply continued – wish to make a matter of dispute out of measures that exclusively belong to the internal affairs of sovereign states, obviously in order to induce the Balkan governments to subordinate their policy to the endeavors of the Western governments. As their actions do not constitute violations of the treaties, there is no "definite object of dispute." To their charge that the Western Powers cannot artificially create a dispute, the Western Powers replied that the Balkan countries have no grounds for declaring unilaterally that a dispute does not exist. As the interpretations placed by the Western Powers on the acts of the Balkan governments did not correspond with the interpretations advanced by the latter, "the existence of a dispute is self-evident." The sovereignty of the Balkan countries is limited by the very terms of the peace treaties, and the invocation by the Western governments of procedures specifically provided for in those treaties cannot be regarded as unwarranted intervention in the internal affairs of the countries bound by those treaties. A refusal to join in the establishment of the commissions can only be considered as "a further deliberate violation of international obligations and as demonstrative of a lack of good faith" on the part of the Balkan countries. The American and British governments in conclusion reiterated their determination to have recourse to all appropriate measures for securing the compliance by the Balkan governments with their treaty obligations.

In October, 1949, the question of observance of human rights in the three Balkan countries was discussed exhaustively in the *Ad Hoc* Political Committee of the General Assembly of the United Nations. The Australian delegation pressed for direct action by the General Assembly and the appointment of a committee of investigation. The American delegation insisted that the procedure provided for by the peace treaties should be exhausted before an action on the merits is taken by the Assembly. It proposed that the paramount legal question of the extent of obligations for pacific settlement of disputes contained in these treaties should first be decided by an impartial judicial authority. It requested the General Assembly to ask the International Court of Justice for an advisory opinion on the subject and announced that it was prepared "to accept the Court's opinions as binding." The delegates from Eastern Europe denied the jurisdiction of the General Assembly to deal with the general question of human rights in the Balkan countries on the ground that this would be interference in their domestic affairs. They also objected to the reference of the question of interpretation to the International Court of Justice because they felt that the provisions of the peace treaties should be interpreted only by means of the special procedures provided for in the treaties themselves, and that questions should be referred to the Court only by agreement of all signatories to these treaties. Mr. Vishinsky (Soviet Union) contended, in particular, that there was no "dispute" in view of the fact that only one party to the alleged dispute was willing to consider it as a dispute. He added that under the treaties a commission could be established only after an agreement was reached between the three heads of diplomatic missions that there was a dispute, and only after they were unable to solve it. According to him no dispute could arise until the Soviet Union has recognized its existence, as this procedure could be applied only in disputes between all three Allied Powers, on the one hand, and a Balkan country on the other. He believed that an attempt to establish a commission of two members, without the Balkan member, would be "a distortion of the very principle of arbitration, which required the presence of both parties and an arbitrator." On this last question, his point of view was considered as correct by several representatives from countries outside Eastern Europe, who cited several precedents to the effect that an arbitral tribunal cannot be established if one of the parties refuses to appoint its arbitrator.

The committee, after nine days of discussion, adopted the following resolution, which was approved by the General Assembly on October 22, 1949:

OBSERVANCE IN BULGARIA, HUNGARY AND ROUMANIA OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

WHEREAS the United Nations pursuant to Article 55 of the Charter shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

WHEREAS the General Assembly at the second part of its third regular session considered the question of the observance in Bulgaria and Hungary of human rights and fundamental freedoms,

WHEREAS the General Assembly, on 30 April 1949, adopted resolution 272 (III) concerning this question in which it expressed its deep concern at the grave accusations made against the

Governments of Bulgaria and Hungary regarding the suppression of human rights and fundamental freedoms in those countries; noted with satisfaction that steps had been taken by several States signatories to the Peace Treaties with Bulgaria and Hungary regarding these accusations; expressed the hope that measures would be diligently applied, in accordance with the Treaties, in order to ensure respect for human rights and fundamental freedoms; and most urgently drew the attention of the Governments of Bulgaria and Hungary to their obligations under the Peace Treaties, including the obligation to co-operate in the settlement of the question,

WHEREAS the General Assembly has resolved to consider also at the fourth regular session the question of the observance in Romania of human rights and fundamental freedoms,

WHEREAS certain of the Allied and Associated Powers signatories of the Treaties of Peace with Bulgaria, Hungary and Romania have charged the Governments of those countries with violations of the Treaties of Peace and have called upon those Governments to take remedial measures,

WHEREAS the Governments of Bulgaria, Hungary and Romania have rejected the charges of Treaty violations,

WHEREAS the Governments of the Allied and Associated Powers concerned have sought unsuccessfully to refer the question of Treaty violations to the Heads of Mission in Sofia, Budapest and Bucharest, in pursuance of certain provisions in the Treaties of Peace,

WHEREAS the Governments of these Allied and Associated Powers have called upon the Governments of Bulgaria, Hungary and Romania to join in appointing Commissions pursuant to the provisions of the respective Treaties of Peace for the settlement of disputes concerning the interpretation or execution of these Treaties,

WHEREAS the Governments of Bulgaria, Hungary and Romania have refused to appoint their representatives to the Treaty Commissions, maintaining that they were under no legal obligation to do so,

WHEREAS the Secretary-General of the United Nations is authorized by the Treaties of Peace, upon request by either party to a dispute, to appoint the third member of a Treaty Commission if the parties fail to agree upon the appointment of the third member,

WHEREAS it is important for the Secretary-General to be advised authoritatively concerning the scope of his authority under the Treaties of Peace,

THE GENERAL ASSEMBLY

1. EXPRESSES its continuing interest in and its increased concern at the grave accusations made against Bulgaria, Hungary and Romania,

2. RECORDS its opinion that the refusal of the Governments of Bulgaria, Hungary and Romania to co-operate in its efforts to examine the grave charges with regard to the observance of human rights and fundamental freedoms justifies this concern of the General Assembly about the state of affairs prevailing in Bulgaria, Hungary and Romania in this respect;

3. DECIDES to submit the following questions to the Internationl Court of Justice for an advisory opinion:

"I. Do the diplomatic exchanges between Bulgaria, Hungary and Romania on the one hand and certain Allied and Associated Powers signatories to the Treaties of Peace on the other, concerning the implementation of article 2 in the Treaties with Bulgaria and Hungary and article 3 in the Treaty with Romania, disclose disputes subject to the provisions for the settlement of disputes contained in article 36 of the Treaty of Peace with Bulgaria, article 40 of the Treaty of Peace with Hungary, and article 38 of the Treaty of Peace with Romania?"

In the event of an affirmative reply to question I:

"II. Are the Governments of Bulgaria, Hungary and Romania obligated to carry out the provisions of the articles referred to in question I, including the provisions for the appointment of their representatives to the Treaty Commissions?"

In the event of an affirmative reply to question II and if within thirty days from the date when the Court delivers its opinion the Governments concerned have not notified the Secretary-General that they have appointed their representatives to the Treaty Commissions, and the Secretary-General has so advised the International Court of Justice:

"III. If one party fails to appoint a representative to a Treaty Commission under the Treaties of Peace with Bulgaria, Hungary and Romania where that party is obligated to appoint a representative to the Treaty Commission, is the Secretary-General of the United Nations authorized to appoint the third member of the Commission upon the request of the other party to a dispute according to the provisions of the respective Treaties?"

In the event of an affirmative reply to question III:

"IV. Would a Treaty Commission composed of a representative of one party and a third member appointed by the Secretary-General of the United Nations constitute a commission, within the meaning of the relevant Treaty articles, competent to make a definitive and binding decision in settlement of a dispute?"

4. REQUESTS the Secretary-General to make available to the International Court of Justice the relevant exchanges of diplomatic correspondence communicated to the Secretary-General for circulation to the Members of the United Nations and the records of the General Assembly proceedings on this question;

5. DECIDES to retain on the agenda of the fifth regular session of the General Assembly the question of the observance of human rights and fundamental freedoms in Bulgaria, Hungary and Romania, with a view to ensuring that the charges are appropriately examined and dealt with.

Practising lawyer's guide to the current LAW MAGAZINES

CORPORATIONS—*"Abuses of Shareholders Derivative Suits":* Henry W. Ballantine, Professor of Law at the University of California, in considering the 1949 addition to the California Corporations Code which is designed to protect corporations, their officers and employees from litigation expenses that may be unjustifiably foisted upon them, has made a careful analysis of the theory of the shareholders' derivative action for injury done the corporation by the management and its abuse in the so-called "strike" suit in the September, 1949, issue of the *California Law Review* (Vol. 37—No. 3).

The historical background on this equity action, its recognized possibilities of abuse, and its control in the Federal Rules and the statutes of the States of New York, New Jersey, Pennsylvania and Wisconsin, as well as the theory of its control as lately set forth by Mr. Justice Jackson (*Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541) are carefully traced. The possibilities of over-control and the controversial New York statute are discussed in relation to the provisions of the California statute, particularly in regard to the requirement in the latter that the action be shown nonbeneficial to the corporation before the statute may be called into play. The question is of considerable import since federal courts are required to follow state policy of heading off selfish "strike" suits of no possible benefit to the corporation. (Address: California Law Review, Boalt Hall of Law, University of California, Berkeley 4, Calif.; price for a single copy $1.50.)

DOMESTIC RELATIONS—*"Marriage and Civil Law":* Writing in the *St. John's Law Review* for April, 1949 (Vol. 23—No. 2; pages 209-242), Justice Michael F. Walsh of the New York Supreme Court discusses the relationship of the civil law to the marriage institution. A solution of the divorce problem is not attempted, but the author endeavors only "to state the problems rather than to answer all the questions, to arouse interest rather than to evoke controversy". Marriage is defined and found to be a creation of natural rather than civil law. The nature and purposes of marriage are discussed and the relationship of the civil law to this institution is set forth. After discussing the causes of marriage failures, Justice Walsh proposes possible lines of action. He suggests a state could survey the problem by a board of competent authority. He suggests more emphasis on conservative instruction on marriage and family living. Principally, he advocates the elimination of easy divorces. Justice Walsh does not believe that divorce is the mere result of an already broken marriage, but feels that an easy divorce contributes to the growing rate of marriage dissolutions. (Address: St. John's Law Review, St. John's University School of Law, 96 Schermerhorn St., Brooklyn, N. Y.)

FEDERAL COURTS—*"Weary Erie":* In the Summer, 1949, issue of the *Cornell Law Quarterly* (Vol. 34—No. 4; pages 494-532), John Keeffe, John J. Gilhooley, George H. Bailey and Donald S. Day have collaborated in producing a long-needed broadside against the doctrine of *Erie Railroad* v. *Tompkins.* With full annotation and clear analysis of cases, the contentions are pressed that *Swift* v. *Tyson,* not *Erie Railroad* v. *Tompkins,* produced more justice (speaking simply in terms of the actual result in the cases decided under either doctrine), that *Swift* v. *Tyson* resulted in greater certainty of law and less needless litigation, that *Erie* has not eliminated "forum-shopping" but merely made different considerations important to the litigant. In addition, the national power over the procedure in the federal courts, and even over their jurisdiction, is seriously threatened, to say nothing of the efforts currently being made to subjugate the one remaining stronghold of federal judicial independence—the freedom of federal courts with respect to issues that involve federal statutory law. All this, say the authors, is a poor exchange for the sacrifice of national uniformity of substantive law, which—Justice Frankfurter to the contrary notwithstanding—it is contended was promoted under *Swift* v. *Tyson.*

Even to the strongest advocates of conformity, the reasoning advanced by these authors in support of their conclusion that the *Erie* case should be reversed is bound to be sobering, if not wholly convincing. With the recent extremes to which *Erie* has been pushed and with the rising conflicts of the *Erie* doctrine with other equally fundamental policies, one may expect to see more such condemning articles. More intensive analysis and attack on the various particular failings of the *Erie* doctrine are needed before the time is likely to be ripe for a change. But the present article at least makes it manifest that no single arbitrary rule can be the answer to the delicate interplay of factors required to make

Editor's Note

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the *Journal* will endeavor to supply, at a price to cover cost plus handling and postage, a planograph or other copy of a current article.

judicial federalism a wholly successful experiment. (Address: Cornell Law Quarterly, Ithaca, N. Y.; price for a single copy: $1.00.)

INTERNATIONAL LAW—*"The Approach to World Government Through the Technique of a World Constitutional Convention: American Experience":* John H. Davenport, writing in the June, 1949, issue of the *Miami Law Quarterly* (Vol. 3—No. 4; pages 500-563), assumes that a world federation is desirable and necessary, and addresses himself to the practical question of ways of achieving this goal. Among the suggested methods of attaining this end are popular polls, diplomatic negotiations by the President to establish a world federation by treaty, an amendment to the United States Constitution to provide for entry into a world federation and the election of delegates to a world constitutional convention by the people of the United States. Drawing liberally on United States constitutional history, John H. Davenport concludes that the last named device is to be preferred because it offers an inherently practical method of making and ratifying an official proposal in an orderly manner. (Address: Miami Law Quarterly, University of Miami, Miami, Fla.; price for a single copy: $1.00.)

REAL PROPERTY—*"Illinois Real Estate Transactions" A Symposium:* In the Fall issue of the University of Illinois *Law Forum* (Vol. 1949—No. 3; pages 373-504) this publication continues its policy of devoting the major part of each number to one particular field of law. (The first and second issues dealt with estate planning and Illinois administrative procedure). This symposium consists of six articles dealing with the real estate contract, escrows, rights of persons not parties to the contract, the merchantability of title, the deed itself, and the income tax problems of real estate transactions. The first five of these subjects are discussed by experienced attorneys on the basis of Illinois practice and authorities. The final article, dealing with federal tax questions, offers tax reducing suggestions which are applicable, of course, to all real estate transactions, whether Illinois property is involved or not. While this series of articles is primarily concerned with the problems of the Illinois practitioner, many of the suggestions and much of the analysis may be of help to attorneys elsewhere. The collection of these related topics in one issue provides a means by which members of the profession can quickly review many of the practical and technical considerations surrounding transactions in real property. (Address: Law Forum, University of Illinois, Urbana, Ill.; price for a single copy: $1.00.)

TAXATION—*"Escape from Spiegel":* Daniel M. Schuyler, an acknowledged authority on Illinois property law, has written an article in the May-June, 1949, issue of the *Illinois Law Review* (Vol. 44—No. 2; pages 138-141), of immediate value to all tax practitioners, dealing with the problems of how to avoid tax-fraught residual interests by draftsmanship and how to extinguish such residual interests as existed on the fateful date of the recent decision in *Commissioner* v. *Spiegel's Estate,* 335 U.S. 701 (1949). That Mr. Schuyler confines himself mainly to Illinois law in no way detracts from the general usefulness of this article to lawyers everywhere, for not only is Illinois law integral to a full understanding of the *Spiegel* case itself, but also the Illinois rules as to the alienability of contingent future interests present as difficult a situation for getting rid of so-called "reverters" as is likely to exist in any state. For the drafting of future trust instruments, Mr. Schuyler suggests a terminal provision granting the trust property in trust for general charitable purposes. For the extinguishment of presently-existing reverters, and until the state legislatures act to provide a more certain way, the careful use of the ancient concepts of release and a deed operating by way of estoppel by after-acquired title is advocated. Mr. Schuyler also has some useful words to say on the contemplation of death problem in relation to current extinguishment by settlors of already created residual interests and on the use of state declaratory judgment procedure to affect the federal estate tax consequences in specific instances. The article was written before the recent amendments to Section 811 (c) of the Internal Revenue Code largely eliminated the problem of being "caught" with existing Spiegel-type reverters. (Address: Illinois Law Review, Northwestern University School of Law, Chicago 11, Ill.; price for a single copy: $1.00.)

TRUSTS AND ESTATES—*"The Inter Vivos Branch of the Worthier Title Doctrine":* In the May, 1949, issue of the *Oklahoma Law Review* (Vol. 2—No. 2; pages 133-176), Joseph W. Morris of the Kansas and Oklahoma Bars considers the application of the "worthier title" rule in modern law to inter vivos transactions, its significance, and its justification. The author states that the rule, despite its feudal origins, has many modern legal aspects, being applied—not without confusion by the courts—in twenty-four jurisdictions and having a potential application in twenty-four other jurisdictions. Few states have effectively abolished it by statute. Mr. Morris finds no justification for the rule as "one of law" in modern society. He makes a careful anaylsis of the factors considered by those courts that have applied the rule as "one of construction" and sets forth the specific legal consequences flowing from the rule. His article points out that the doctrine has been increasingly evident since 1919 and concludes with the *caveat* that "any attorney who engages in the general practice, or who is a specialist in property or probate practice, should have at least a speaking knowledge of this branch of the worthier title doctrine." (Address: Oklahoma Law Review, University Press Building, Norman, Okla.; price for a single copy: $1.50.)

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

Disagrees with Address of President Holman

■ The annual address of Retiring President Frank E. Holman, published in your October issue, appropriately warns us of the dangers of too much government. All good things in life, from too much food or drink to too much medicine, from too much anarchy to too much government, are dangerous in excess. Mr. Holman's address is evidence that we may even have too much of warnings and denunciations.

Thus, Mr. Holman's warnings are carried to such excess that he is obliged explicity to disapprove of *Shelley* v. *Kraemer*, 334 U.S. 1, where the United States Supreme Court held that restrictive covenants excluding persons of designated race or color from the use or occupancy of real estate could not be enforced in the courts without violating the Fourteenth Amendment.

Mr. Holman states that this decision resulted from "the agitation of pressure groups and even government officials". This does grave injustice to many ethical, religious and liberty loving groups who shared the responsibility for the presentation of the cause of those suffering from racial discrimination. Among the organizations who went so far as to employ counsel to act as *amici curiae* before the Supreme Court for these victims of discrimination were the Civil Liberties Department of the Grand Lodge of the Elks, the Protestant Council of New York, General Council of the Congregational Christian Churches, the American Civil Liberties Union and the American Unitarian Association.

For once, the United States Supreme Court was unanimous in this decision. It was widely hailed by editors and publicists as a long-overdue vindication of our American loyalty to the basic doctrine of the Declaration of Independence, that all men are created equal. To listen to a President of the American Bar Association at this late day, decry this decision as evidence of decay in our adherence to principles of freedom is to suffer humiliation over this echo of earlier intolerances. Anyone who knows Mr. Holman can feel assured that he does not personally share in such intolerance, even though he sees in it a vested right to use economic power for its maintenance.

One wonders, therefore, by what process of illogic Mr. Holman has been able to persuade his first-rate mind that to permit members of other races to buy and occupy residences with the same freedom as their native white fellow-citizens is to arm them, as he contends with "a claim of superior right". Doubtless each of us has the right to be as intolerant as he likes. But we have no right to use such intolerance to forbid other citizens, with the same rights as ourselves, from owning land whenever a willing buyer and a willing seller are ready to transact business. It is a slander of American constitutional freedom to say that it means that such intolerant men have a right, which the law *must enforce*, to use their racial prejudices as a weapon to drive racial minorities into ghettoes and slums.

It seems equally unfortunate that, in discussing federal aid to education, Mr. Holman should charge that "the stated urgent need for federal aid is largely fraudulent". Mr. Holman seeks to support this charge of fraud by pointing out that Mississippi on January 1, 1947, had "a surplus of $25 million", and that in recent years she has more than doubled the salaries of her teachers. Resulting from the limitation upon highway and public buildings spending during the war, plus the increase in state revenues growing out of wartime super-activities, many states after the war had very large surpluses. Mr. Holman's own State of Washington, a state of about the same population as Mississippi, at that same time had a surplus many times the size of Mississippi's. The increase in teachers' salaries merely proves that Mississippi is making a gallant effort to catch up with her sister states. Her expenditures for education are still far, far behind that of most Northern states.

There are many thousands of our fellow-citizens who are unselfishly pleading for an equalization of educational opportunity through the use of federal aid, in order that boys and girls in our poorer states may have an education in some degree comparable with that accorded our children in our richer states. In so contending, they may be wrong. That is a subject for debate. But it certainly does not advance the cause of truth, or strengthen Mr. Holman's position to say that their representations are "largely fraudulent".

Mr. Holman also declares that

> The American concept of a constitutional and representative republic is a complete antithesis to a welfare or paternalistic state.

Mr. Holman is of course aware that the Preamble to our Constitution provides as one of the reasons for establishing that more perfect union is "to promote the general welfare". He is aware, too, that in the beginning years of the Republic, Alexander Hamilton secured the enactment of a protective tariff, to promote the welfare of manufacturing, which in turn, he urged, would promote the general welfare of us all. From the beginning of the Republic, this protective tariff was denounced as "paternalistic", and that argument has unsuccessfully continued down through the years. Nevertheless, we have continued to promote the general welfare on an increasing scale as we have grown in wealth and means of promoting it.

Now, it may well be argued that we are carrying it too far, that we should trim our expenditures in this respect. But to say that these efforts of our government to promote the general welfare are in antithesis to our "American concept" is to fly flagrantly in the face of our Constitution and of our history under it.

It is a pity that Mr. Holman has carried his argument to such extremes that he persuades only that minority who may already be of his way of thinking.

BENJAMIN H. KIZER
Spokane, Washington

Another Opinion of Mr. Holman's Speech

■ The President's Annual Address: "Must America Succumb to Statism?", appropriately published as the leading article in the October issue of the AMERICAN BAR ASSOCIATION JOURNAL, ought certainly to receive a thorough and diverse comment from members. That the subject of the article commands consideration of the most serious order is undeniable, but compression of thought is naturally incumbent.

Of particular interest, as it seems to me, is Mr. Holman's stated belief "—that the leaders of both parties and many of our educators and others are misreading the sentiment of a majority of the American people". Granting that this belief is substantiable, there is posed an extremely cogent query as to how the sentiment of a majority of the American people may be read, indeed, exerted. However factual in one sense it may be to say that the people's will can be read on the day that the votes are counted, this observation is too apparently simple to be informative. As always, we can do well to seek guiding light from past times when statesmen whose stature is now accredited coped with problems as great as those that plague us.

Lately, a ponderable thesis caught my interest and may be relevant here. Rule by the "concurrent majority" was considered in a magazine article, which need not be further identified,[1] since credit was there acknowledged to John C. Calhoun as proponent of the doctrine. It is in the nature of a comforting thought if we may trust that minorities can press their wills when the majority concurs but only so long as this concurrence lasts (possible termination of concurrence being implicit). Here might well be a workable principle of self-government, worthy of American concepts and ideals. One could refer to epochs in our history as a nation when such a principle has seemed to work and work well. May we indulge hope that this *modus operandi* will guide us past the peril of statism, cited but certainly not needing to be cited by Mr. Holman alone? I do not particularize this or that minority which for an election or two has received concurrence of the majority to press toward some end. Today's problem overshadows yesterday's. We are rightly concerned to know whether anything can work against the slavery of statism that seems all too imminent. Perhaps by rule of the "concurrent majority" we can maintain freedom. If our candidates are statesmen so much the better, but even if they be only candidates, let them go to the electorate inviting concurrence and retraction of concurrence. There are states in this great Union—at least I know one—where this salutary thing will veritably occur in the next two impending national elections. I have hope.

RAYMOND L. GREEN
Toledo, Ohio

"Statism" Just Another New Catchword?

■ Collective efforts produced the American Telephone and Telegraph, General Motors, etc. The assumption of sovereign powers by these great corporations by a natural process resulted in the antitrust laws which have been so rarely and so feebly enforced.

If a Soviet or Big Business takes over the Government of the United States, as the powers of the Senate, the President, the Congress and the courts "wither away", then the result will be very like that of the government of Russia—100 per cent materialistic.

Hence this attack on "statism" must cause a good many chuckles in the Kremlin. Forty-seven years in industry have made me a little cautious of every new catchword.

STANLEY M. UDALE
Detroit, Michigan

Calls Attention to Error

■ As a subscriber to the AMERICAN BAR ASSOCIATION JOURNAL I was looking through your September issue and I noticed on page 723 a photograph of a ceremony which took place in Rome. In that photograph are four persons, the fourth of whom (on the extreme right) is listed as Mr. Justice Ferrara, President of the Supreme Court of Italy.

Unless I am very much mistaken that person is not Mr. Justice Ferrara but is our own American Ambassador James C. Dunn.

PAUL W. WILLIAMS
New York, New York

1. John Fischer, contributing to *Harper's Magazine*.

[*Editors Note:* Mr. Williams is correct. We thank him for calling our attention to the mistake, and regret the error.]

Advocates a World Government of Limited Power

■ Congratulations and thanks are due the JOURNAL for the recent publication of a number of splendid articles. They are big contributions looking towards a better society and I wish they could be read by everyone. In particular I have in mind Frank E. Holman's address on statism (October issue) and W. T. Holliday's article on world government (August issue). Offhand, one might think there was no connection between the two—but, in fact, they are closely related.

A great number of good American citizens are against any proposal for world government. Their reaction may be emotional rather than reasoned. Instinctively, they are beginning to feel that there may be something wrong about too much government. They are opposed to the concept of world government, because they are surfeited with government and dread the thought of still another layer of bureaucrats regulating our lives and restricting our freedom. In other words, they are thinking in terms of the currently-fashionable welfare state, with the regimentation, collectivism and destruction of initiative that it entails. However, if they would but consider for a minute that the proponents of world government have in view a federal government of limited power (only those powers necessary for the enforcement of peace being delegated to the world organization) their objections would probably vanish. Furthermore, if peace were assured, as undoubtedly would be the case if there existed a world federal government, the trend toward statism might be halted and then reversed. Modern statism was born out of the exigencies of war and thrives on the necessity to prepare for war. Unless stopped, it also becomes a cause of war. Let us eliminate war and in so doing recover the freedom we have lost to the welfare state.

MARC A. RIEFFEL
Plandome, New York

A Lawyer Admonishes the Clergy

■ We hear much complaint about the church not being the influence in our lives that it should be and of which it is capable. One reason for this is the ineffectiveness of so much of our preaching. An improvement in this respect would increase attendance at services and strengthen our spiritual lives.

May I point out a distinction in this respect between the technique of my profession—the law—and that of too many of the clergy. They simply announce their text, explain the circumstances surrounding it, and then expound the relevant theology. At this point they have stated what we lawyers refer to as "Findings of Fact" and "Conclusions of Law". That is where they too often stop, leaving an impression of "take it or leave it", whereas that is where the lawyer really begins. Because on that foundation he "goes to work on his jury" and makes a plea for his "So Whats", and, from the very nature of a plea, he demonstrates devotion to his cause with all the zeal and fervor and persuasiveness of which he is capable. It is the most important part of the presentation of his case. The "So What" of a clergyman, lawyer or advocate of any cause defines his objectives but must be supported by a plea. If it is not, the advocate does not have the opportunity to "let himself go" with spirited conviction. If a lawyer would overlook this vital part of his responsibility, his client would think he had selected an incapable advocate. A lawyer of this type (almost inconceivable) would not win many cases and his clientele would vanish. By the same token, empty pews are generally caused by an empty pulpit.

The lawyer and clergyman are engaged in controversial professions, the former briefed between man and man for things temporal, while the latter holds a brief from Our Lord and Redeemer in the age-long struggle between the power of the Holy Spirit and the power of the World, the Flesh and the Devil for things eternal. A consecrated pulpit, free from spiritual anemia and "working to beat hell" will fill the pews, and, what is more, infinitely more important, save souls. The clergy should never forget to "follow through" and support their "So Whats" with a sincere, zealous and convincing plea.

Undoubtedly "the appeal to the jury", that is to the judgment of conscience and will, is the weakest part of many a sermon and very often omitted entirely.

CHARLES A. LOCKE
Pittsburgh, Pennsylvania

Supreme Court Stated Nation's Religious Complexion

■ Rather belatedly there comes to my attention a letter in the July issue of the JOURNAL from Mr. Richardson Blair of Philadelphia, which was captioned "Is the United States a Christian Nation?" His letter was in response to a letter of Mr. Samuel D. Menin in the March issue.

It may be of interest to note that in *Holy Trinity Church* v. *United States,* 143 U.S. 457, 36 L. ed. 226, 232, the Supreme Court of the United States without dissent stated categorically, "This is a Christian Nation". The documentation of this conclusion, which traces the prenatal influences attending the birth of this nation, goes beyond the Mayflower Compact and even unto the commission to Christopher Columbus and should be sufficient to establish without cavil the religious complexion of our nation, at least as viewed by our Supreme Court.

JULIAN P. ALEXANDER
Supreme Court of Mississippi

Preventive Law Again

■ In the September issue of the JOURNAL, at page 783, you published a comment by Leroy E. Peabody, entitled "An Economist Suggests 'Preventive Law'". He makes the point that the legal profession should look as favorably on "Preventive

Law" as the medical profession does on preventive medicine.

I should like to report that I have devoted much time over the past several years to the development of a workable approach to "Preventive Law". One problem in preventive law is to develop methods whereby the layman can, without a lawyer's training, predict the probability of legal trouble. The analogy to medicine is good, but one difference between preventive medicine and preventive law is that in matters of personal health one frequently feels "pain" or "discomfort" before the disease gets the better of him. By the time one is aware of legal pain, for example, gets sued, the opportunity to use preventive measures is too far gone. Yet I have long felt that an adequate theory of preventive law for layman is possible and should be developed. There are, in my opinion, principles and techniques that the average intelligent business man can employ to minimize legal trouble and keep himself reasonably legally healthy.

In order to demonstrate this I have undertaken to write a book for laymen which Prentice-Hall, Inc., will publish when the manuscript is complete. The approach I believe is rather novel but flows from much of my experience as a lawyer, businessman and teacher. I might add that a similar problem exists in the educational program in business law courses offered in colleges as part of the commerce curriculum. In these courses the textbooks and the teaching should be designed to emphasize symptoms of legal trouble whereas I have found that the textbooks (and doubtless much of the teaching) consists in endeavors to summarize and put in capsule form the whole body of our commercial law.

LOUIS M. BROWN

Los Angeles, California

The Legal Profession and Artist's License

■ In his letter published in the September, 1949, issue of the JOURNAL, Marvin H. Smith decries the Hollywood distortion of legal procedure in courtroom scenes. Having squirmed in helpless horror for years in witnessing these travesties, I share Mr. Smith's indignation.

But even our own profession has succumbed to the temptation to distort in the name of dramatic or artistic license. Among the several murals on the walls flanking the entrance to the office of the Attorney General on the fifth floor of the Department of Justice Building in Washington is one painted by the late Henry Varnum Poor, purporting to depict the argument of Homer S. Cummings as Attorney General before the Supreme Court of the United States in the so-called *Gold Clause* cases. While no one would recognize the frock-coated figure before the Court as that of Mr. Cummings, *mirabile dictu*, he is shown with his back to the Bench, the dim figures of the Justices composing the background of the picture.

FRANK H. ELMORE, JR.

Jacksonville, Florida

Review of the Trial of Christ an Anticlimax?

■ Judge McCulloch's comment on the Crucifixion mob as a "picket line" does not fit the writer's idea as to what happened. We wish we knew all the facts. However it seems significant that although no book on the Trial of Christ was published (so far as I know) between 1925 and 1948, there were three published in May, 1948, and (I understand) there have been two more since then. The movement to have that Trial "reversed" by the new Supreme Court of Israel is, it seems to me, anticlimactical in the face of prophetical fulfillment. Why do you not review all five of the recent books on the subject—let's see what you think of them? Ask each author to review another's work? I would be glad to have my book thus treated by another and to fairly review one of the books.

DAVID K. BREED

St. Louis, Missouri

Attitude of Courts Toward Patent System

■ Recently there has been a good deal of discussion in regard to the policy of the Supreme Court with reference to patents. The vacancies created by the passing of Justices Murphy and Rutledge raises a question in the minds of members of the patent profession, as it does in the minds of those keenly interested in other phases of the Court's work, as to the effect of new members of that august body at a time when so many problems are so critically poised.

The attitude of the Supreme Court has not been one of unqualified friendliness to the American patent system. Never inclined to support all patents, the validity of which has been brought into question, the record of patents in the Supreme Court has been particularly alarming to owners of patents in recent years. The Court, which previously had shown at least a general disposition to carry the patent system to its intended destination, suddenly veered around the years 1932-1933 and since then has been vigorously proceeding in some undetermined new direction.

The attitude of the Supreme Court is reflected in the decisions of the lower federal courts. The ensuing state of precedent today is such as to imbue many patent lawyers with apprehension for the future of the American patent system.

Some members of the profession are convinced that the remedy for the present uncertainties is new legislation. The present basic statute now is more than a century old. For many decades it worked beautifully. It does not best fit modern conditions. It has been pushed around by the courts and left standing at the bend.

In the enclosed drawing I have graphically set forth the current problem. I also enclose a copy of the patent drawing which suggested the cartoon.

J. HAROLD BYERS

Washington, D. C.

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Joseph S. Platt, Committee Chairman, Harry K. Mansfield, Vice Chairman.

The Pattern of Tax Relief Legislation

■ Ever since the decisions of the United States Supreme Court in the estate tax cases of *Commissioner* v. *Church's Estate,* 335 U.S. 632, and *Spiegel's Estate* v. *Commissioner,* 335 U.S. 701, were handed down on January 17, 1949, there have been strenuous efforts, primarily headed by the Tax Section of the American Bar Association, to accomplish relief by means of legislation. As almost every lawyer concerned with taxes and estates knows, the *Church* case overruled *May* v. *Heiner,* 281 U.S. 238, and held that even pre-1931 transfers wherein a grantor reserved a life interest were subject to estate tax under Section 811 (c) of the Internal Revenue Code upon the grantor's death; the *Spiegel* case indicated that Section 811 (c) would apply in any case where the grantor retained a possibility of reverter even though by operation of law. These decisions upset accepted doctrine to such an extent that pressure for legislative relief arose quickly. That relief has now been secured, but the path followed is very interesting as an example of the legislative process.

As far back as 1945 the American Bar Association concerned itself with taxation of possibilities of reverter and adopted a resolution (70 *A.B.A. Rep.* 138) that all reversionary interests be included in the gross estate of the grantor at their actuarial value. This problem, of course, was rendered acute by the *Spiegel* decision, and in addition, the equally important matter of pre-1931 reserved life estates was raised by the *Church* decision.

After these decisions the Treasury Department adopted amended estate tax regulations apparently designed to ward off any serious legislative attack by offering only limited relief. It proposed not to apply the *Church* case to estates of decedents who died on or before January 17, 1949; it proposed no change in its regulations regarding reversionary interests, thus retaining the twin requirements for taxation that the decedent shall have retained some property interest and that the property be obtainable only by persons who must survive the decedent. These regulations were more favorable to taxpayers than the decisions, but they were considered not to go far enough.

Various bills were introduced in Congress, beginning with H.R. 5045, dealing with these problems. The manner in which the final legislation emerged is very interesting. On July 18, H.R. 5268 passed the House of Representatives. It contained provisions for various technical changes in connection with the income, estate, gift, and stamp taxes, but nothing with regard to *Church* and *Spiegel* relief. Provisions as to this were added by the Senate Finance Committee and passed the Senate in slightly modified form. The bill then went to conference.

The first stumbling block apparently was a Senate provision extending the depletion allowance. Strenuous objection from the Treasury Department to this provision seemingly would have led to a veto of the whole bill, so this provision was dropped. In addition, the relief from the *Church* and *Spiegel* decisions was narrowed in several respects. Furthermore, a new provision was added, taxing prospectively transfers previously held nontaxable by the United States Supreme Court in *Reinecke* v. *Northern Trust Co.,* 278 U.S. 339. It is apparent that a good deal of trading must have gone on in conference in order to pass a bill which would receive the approval of the President. The bill as changed became law with the President's signature on October 25, 1949.

The matter of pre-1931 reserved life estates is taken care of by providing that no tax will be levied on estates of decedents dying prior to January 1, 1950, in the case of transfers with reserved life interests made prior to March 4, 1931 (or, in certain cases, prior to June 7, 1932). Further, grantors who transferred property with a reserved life interest prior to March 4, 1931 (in certain cases, prior to June 7, 1932), have the privilege of relinquishing such interests tax-free during 1949 and 1950, unless the property would have been taxable under Section 811 (d) had the grantor died on October 7, 1949. See Sections 7 and 8 of Public Law 378, 81st Cong., 1st Sess. As can be seen, this leaves open a risk that such a grantor, expecting to release his interest tax-free, may die in 1950 before doing so, with the result that an estate tax will be due on account of his retained interest.

The matter of reversionary interests is taken care of by providing that, for transfers prior to October 8, 1949, no reversionary interests by operation of law shall be taxed, nor shall express reversionary interests be taxed if their value immediately before the decedent's death does not exceed five per cent of the value of the property. Refunds on account of both these relief provisions may be obtained without regard to the Statute of Limitations if claimed before October 25, 1950.

For transfers after October 7, 1949,

however, the property will be subjected to estate tax whether or not the decedent retained any property interest if, and only if, the beneficiaries can obtain the property only by surviving the decedent, or, under alternative contingencies, if the beneficiaries can obtain the property only by surviving the earlier to occur of either the decedent's death or some other event, and the decedent in fact dies earlier; the property, nevertheless, shall not be taxed if the beneficiaries are given taxable powers of appointment. Section 7 (a) of Public Law 378. This provision is particularly interesting for it is more restrictive for the future than existing court decisions and the Treasury's own regulations. Actually, the contraction probably does no harm, for few lawyers would have drawn a "survivorship" trust of any type. Apparently, reversionary interests, whether express or implied, will be henceforth taxed only at their actuarial value provided they are the final property limitations and do not interfere with any beneficiary's possession or enjoyment of the property.

The legislation is most welcome and aids greatly in relieving the oppressive effects of the Supreme Court decisions. Its course well bears study for illumination of the eccentric but practical process of legislation.

OUR YOUNGER LAWYERS

Charles H. Burton, Secretary and Editor-in-Charge, Washington, D. C.

WILLIAM R. EDDLEMAN

Junior Bar Conference Sponsors Americanism Month

■ The Junior Bar Conference is sponsoring an Americanism Month which began on Thanksgiving, November 24, 1949, and will continue through Christmas Day, December 25, 1949. The objectives of this program are to bring to the American people a realization of the virtues of our republican form of government and to remind Americans that it is a privilege to be a citizen of the United States.

In keeping with these objectives the Americanism Month program is an attempt to make every citizen aware of the reasons why our government is superior to all other forms of government. Among the main topics on the program are freedom of speech, freedom of religion, as well as a contrast of Americanism with Communism. Particular attention will be directed to the American system of law and justice as the first line of defense for the protection of liberty and freedom.

National Chairman William R. Eddleman, Seattle, Washington, in announcing this program stated: "The Junior Bar Conference is the best-qualified group to keep alive an appreciation on the part of all Americans of the benefit of Americanism. We, as young lawyers, have a large stake in the future, have a better knowledge of the historical development out of which these liberties and freedoms grew, and have a keener ability to display not only the simple truth but the ultimate necessity of each citizen remembering that 'Eternal vigilance is the price of liberty.'"

Lewis R. Donelson III, Memphis, Tennessee, National Director of the Public Information Program, has been shouldering most of the responsibility for this far-reaching project. Edward E. Stocker, Little Rock, Arkansas, is serving as special chairman of Americanism Month. George Edward Cotter, New York City, has been in charge of radio programs, and Russell E. Bowers, Flint, Michigan, has been charged with the handling of publicity for the overall program.

A series of four radio program scripts has been distributed to all state public information directors. These programs include discussions on the Declaration of Independence, the Constitution and the Bill of Rights. Almost fifty of the groups affiliated with the Junior Bar Conference have expressed their approval of the program and have undertaken the responsibility for putting it across on the local level. Numerous members of the House of Delegates and others long active in our Association have approved this program and have made many helpful suggestions. Speeches are being delivered daily in various high schools where arrangements have been made by the local Junior Bar Conference groups. Hundreds of radio programs emphasizing Americanism Month have been and are being heard throughout the Nation. Governors of many states and mayors of many cities have declared by proclamation the period from Thanksgiving to Christmas, 1949, Junior Bar Conference Americanism Month. Many outstanding leaders in the fields of industry, labor and government have given their approval to this idea and are presently cooperating with young lawyers through speakers' committees in numerous cities from

coast to coast. In this manner they are carrying the message of Americanism to civic, fraternal, labor, business, farm and social groups.

Many of the Conference officials have been making speeches before local groups emphasizing Americanism Month. National Chairman-Elect W. Carloss Morris, Jr., Houston, Texas, spoke before the Junior Bar Section of the Bar Association of the District of Columbia on November 17 and emphasized the principles of Americanism as an adjunct to the presentation of the honorable mention award of merit received by the District group. Likewise, National Chairman William R. Eddleman of Seattle, in presenting the honorable mention award of merit to the Hennepin County Junior Bar at a meeting in Minneapolis urged the unanimous participation of young lawyers in the performance of this fine public service. Former National Chairman James D. Fellers, Oklahoma City, assisted with speeches on Americanism as he presented awards of merit to the Junior Bar Section of the State Bar of Texas and to the Dallas Junior Bar Group.

Frank E. Holman, Seattle, Washington, immediate past-president of the American Bar Association, suggested that if the Junior Bar Conference and lawyers in general would devote just a small part of their energy toward protecting the benefits that we, as Americans, enjoy, an invaluable service would be performed, not only for the American people, but for the world at large. As this program draws to a close the Junior Bar Conference will consider putting on a bigger and better program of the same type next year, and hopefully anticipates continuing support of the entire Association.

Department of Legislation

Harry W. Jones, Editor-in-Charge

Congressional Committee Chairmen: Status, Influence and Selection

■ "If I were asked to predict the action of any session of Congress, my first demand would be for complete information about the background, experience and attitudes of the nineteen Representatives and fifteen Senators who are to be the chairmen of the House and Senate standing committees at that session." The quoted observation comes from a man of extensive practical experience in federal legislative work. It is an overstatement, perhaps, in that it may seem to take insufficient account of executive leadership as a factor in the contemporary legislative process. But, beyond question, the chairmanship of a House or Senate standing committee is a post of great strategic importance, which carries with it great power to influence the course of congressional action in the area of the committee's legislative jurisdiction.

Events immediately preceding the *sine die* adjournment of the First Session of the 81st Congress on October 19 demonstrated again that a bill or program opposed by the chairman of the appropriate House or Senate standing committee has a rocky road ahead of it. At this writing, the Secretary of Defense and the Secretary of the Navy are finding Chairman Carl Vinson of the House Committee on Military Affairs an individual antagonist to be reckoned with on unification and related personnel issues. The long-distance opposition of Chairman McCarran of the Senate Judiciary Committee to the House-approved amendments liberalizing the Displaced Persons Act of 1948 was undoubtedly the decisive factor in the Senate's 36-30 vote to recommit that bill for further study and report to the next Session. Chairman Lesinski of the House Committee on Education and Labor withstood strong challenge from members of his own committee in managing to keep from the House floor a bill for federal aid to education that he believed discriminatory against parochial schools. Like instances could be enumerated, but these are enough to establish that the elders of Congress enjoy and exercise great influence through their standing committee chairmanships.

Legislative Reorganization Act Curbed Powers of Chairmen

Powerful as his present position is, the chairman of a House or Senate standing committee cannot control the work of his committee as tightly as was possible prior to enactment of the Legislative Reorganization Act of 1946. The Act expressly requires that each committee meet on regular days fixed in advance for the transaction of business, as well as at the call of the chairman. And the chairman's former "pocket veto" power over bills approved by the committee majority but disliked by the chairman is specifically dealt with by another Legislative Reorganization Act section, applicable to both Houses, which makes it the duty of the chairman to report every measure approved by his committee and to take all steps necessary to bring the measure to a vote on the floor. Individual member resentment against the highhanded practices of certain past committee chairmen is reflected clearly in these and related provisions of the 1946 Act.

Importance of Chairman's Position Is Inherent in System

Rules of fair play in the management of committee business do not, of

course, affect the substance of the chairman's status and power. His influence is inseparable from his responsibility as the working head of the committee, since the committee is, for most practical purposes, the real law-making agency within the field of its delegated authority. Recent writers on Congress attack the committee system itself—in terms reminiscent of the harsh words employed in Woodrow Wilson's *Congressional Government*—as a form of legislative organization that undermines party responsibility, frustrates the individual member of Congress and leaves the federal legislative process dangerously subject to pressure from organized groups. But no practicable substitute for the committee system has been suggested, short of cabinet government of the British model, and there is certainly no present likelihood of so great a departure from the American tradition of separation of governmental powers. Given a Congress that does more than approve, modify or reject executive proposals, committee working-out of the details of legislative development cannot be dispensed with. As Judge Learned Hand has said of the House and Senate, "so much they delegate because legislation could not go on in any other way".

Present Criticism Centers on Seniority Rule

More moderate critics of the existing state of affairs in Congress would keep the committee system, and the chairman's accompanying privileges, but abolish the long-standing convention of seniority as the basis for committee assignments and for the choice of committee chairmen. The case against the seniority rule is put on familiar grounds, which can be documented by specific references to congressional experience during the past two decades. There is no guarantee that the senior majority member of an important standing committee is the man best fitted by knowledge, temperament, and physical constitution for the difficult task of heading up the committee's work. Seniority operates to give an undue share of the principal positions of congressional leadership to Senators and Representatives from "one party" states, who frequently enjoy almost life tenure in their elective posts. A committee chairman who inherits and retains his position on the basis of seniority is under no obligation to support his party's legislative platform and is not subject to party discipline if he uses his committee chairmanship to block the attainment of his party's program.

Again, it is easier to find fault with the seniority principle than to arrive at a workable and acceptable substitute. Seniority has the great practical advantage of operating automatically and without friction among the committee's members. Open contests for the chairmanship would inevitably result in bad feelings, which might interfere with the harmonious and efficient performance of the committee's responsibilities. The substitute proposal which seems most worthy of consideration is that committee chairmen be appointed by the majority leader of each House of Congress, as a means of sharpening party responsibility for the accomplishment of announced legislative objectives. But the majority leader of the House or Senate has come to occupy a borderline status, part legislator and part legislative agent of the President. All recent Congresses—the 78th, the 79th, and the 81st as well as the 80th—have been concerned about the extent of executive intervention in the federal legislative process. It is a safe guess that most members of Congress would prefer the idiosyncracies of seniority selection to any system that might enable the President, through the majority leaders, to have the controlling say on the designation of standing committee chairmen.

Two Traffic Court Conferences Scheduled for 1950

▪ The American Bar Association and the Traffic Institute of Northwestern University will coöperate with the law schools of the University of Southern California and the University of Washington to hold the first 1950 judicial conferences for judges and prosecutors of courts trying traffic cases. The first, a regional conference for the western states, will be held in Los Angeles at the law school building of the University of Southern California during the week beginning January 30 and ending February 3. The second, a state conference, will be held February 6 to February 10 at the Law School of the University of Washington at Seattle.

Any judge, justice of the peace or prosecutor handling traffic cases can increase his knowledge and skill in problems and procedures peculiar to traffic law enforcement by attending the traffic court conferences. They will be better equipped for the important rôle the traffic court plays in reducing traffic accidents and improving the administration of justice.

Chief Justice Arthur T. Vanderbilt of the New Jersey Supreme Court recently stated, "The public safety and welfare call for judges and prosecutors with specialized training and special interest in traffic law enforcement such as is available at these conferences".

The subjects will include:

The Traffic Accident Problem and Principles of Control;

Rights of Defendants;

Application of Criminal Law and Law of Evidence in Traffic Cases.

Attendance at the conferences is open to all judges in courts which try traffic cases, to prosecutors assigned to such courts, to justices of the peace, to others about to assume such positions and to those having official or quasi official interests in courts that handle traffic matters. The registration fee is $25. Registrations should be made in advance if possible.

Registrations or requests for additional information should be addressed to James P. Economos, Director of the Traffic Court Judges and Prosecutors Conference, 105 West Monroe Street, Chicago 3, Ill.

Lawyers in the News

Francis P. MATTHEWS

Harris & Ewing

■ When Francis P. MATTHEWS was appointed Secretary of the Navy last May, he remarked that "one of the strengths of this country is that the Armed Forces are controlled by civilians".

In October, the Secretary found himself at odds with the ranking admirals over the rôle assigned the Navy by the Joint Chiefs of Staff. After Naval Chief of Staff Louis Denfeld testified before the House Armed Services Committee and criticized the Joint Chiefs of Staff, Secretary MATTHEWS reported to the President that the issue at stake was the maintenance of "civilian control over the military establishment". He declared that he would resign unless Admiral Denfeld were removed. Upon his recommendation, President Truman replaced Admiral Denfeld with Vice-Admiral Forrest P. Sherman, commander of the Sixth Task Fleet in the Mediterranean Sea.

Secretary MATTHEWS is 62. Born in Albion, Nebraska, he worked his way through Creighton University, receiving an A.B. in 1910, an A.M. in 1911 and an LL.B. in 1913. The Navy portfolio is his first national public office.

One of the outstanding Roman Catholic laymen in the country, Mr. MATTHEWS has received several decorations from Pope Pius XI and Pope Pius XII.

Admitted to the Nebraska Bar in 1913, Mr. Matthews had a successful career and had made a fine place for himself when the depression struck.

He has been prominent in many civic and patriotic activities, including two and a half years' service as chairman of a United States Chamber of Commerce committee studying communism, service as a vice president of the USO during the war, and service on the President's Committee on Human Rights. He is a director of Father Flanagan's Boys' Town.

He has been a member of the Association since 1922.

Raymond E. BALDWIN

Underwood & Underwood

■ On December 16, Senator Raymond E. BALDWIN of Connecticut will change his senatorial toga for the robes of a justice of the Connecticut Supreme Court of Errors. He will take the seat vacated by Justice Arthur F. Ells who has reached the mandatory retirement age of 70.

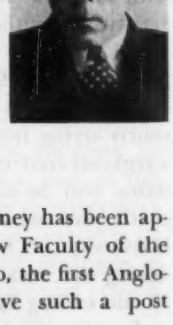
Senator BALDWIN, a Republican was appointed to the court by Democratic Governor Chester Bowles last spring. In making the appointment, the Governor said that he was departing from the custom of advancing Superior Court judges to fill vacancies on the Supreme Court Bench in the belief that the court would "be the gainer from the occasional introduction of outside ideas and viewpoints".

Senator BALDWIN was Governor of Connecticut from 1939 to 1941, and again from 1943 to 1946, when he was elected to the Senate. His present Senate term expires January 3, 1953.

Born at Rye, New York in 1893, he attended school in Connecticut, and graduated from Wesleyan University in 1916. He left Yale Law School when war was declared in 1917 and enlisted in the Navy, where he rose from apprentice seaman to lieutenant (j. g.). He returned to Yale Law School in 1919, and graduated with his LL.B. degree in 1921.

He was elected Prosecutor of the Stratford Town Court in 1927, and became a judge of the court in 1931. He was a member of the Connecticut General Assembly of 1931 and of 1933, and was majority leader in 1933.

He has been a member of the Association since 1936.



Ben Bruce BLAKENEY

■ Ben Bruce Blakeney has been appointed to the Law Faculty of the University of Tokyo, the first Anglo-American to receive such a post since 1923.

Mr. Blakeney is a native of Oklahoma, and is a graduate of the University of Oklahoma and Harvard Law School. He was admitted to

the Oklahoma Bar in 1934 and to the Bar of the Supreme Court of the United States in 1945. He engaged in the practice of law with his father in Oklahoma City from 1934 to 1942, serving for several years as chairman of the Committee on Unauthorized Practice of Law of the State Bar of Oklahoma.

He was called to active duty in April, 1942, and for four years was Chief of the Japanese Intelligence Section of the Army Air Forces Intelligence School. He visited every continent and every theater of operations except the Russian during the war.

From May, 1946, to November, 1948, he was defense counsel at the International Military Tribunal for the Far East, in Tokyo, representing former Japanese Foreign Minister Togo and former Chief of the Japanese Army General Staff Umezu. Later, he was chairman of the defense counsel.

Released from active duty as a major in September, 1946, he then served as chief of defense counsel for the military tribunals of GHQ, SCAP, and as defense counsel for former Chief of Japanese Naval Staff Toyoda.

He is the author of articles published in the JOURNAL (see "The Old Court of Appeals", 28 A.B.A.J. 167, 259, 329, March, April and May, 1942; "International Military Tribunal", 32 A.B.A.J. 475, August, 1946) and other periodicals. He is a member of the American Bar Association, the American Judicature Society and the Oklahoma Bar Association.

Miscellanea

(Continued from page 1007)

students. Fifty-four students were selected from more than 400 applicants. Classes are being held in classrooms borrowed from the liberal arts school. The school expects to have a law school building next year. The dean of the new law school is L. Dale Coffman, who has been a professor at the University of Nebraska and for the last three years was dean of the law school at Vanderbilt University. Roscoe Pound, Dean Emeritus of Harvard Law School, is to serve as visiting professor. U.C.L.A. plans to make its law library "one of the finest and most complete on the coast—if not the nation".

■ Judge Charles E. Clark of New Haven, Connecticut, Reporter for the Advisory Committee on Rules of Civil Procedure, has written the JOURNAL concerning the last editorial contributed by the late Walter P. Armstrong. His letter follows:

"The editorial, 'Congress Should Act', in the September issue of the JOURNAL, which, as you report, was found among Walter Armstrong's papers after his untimely death, brings back poignant memories of a very dear friend and great lawyer. It is especially gratifying to note his very gracious appreciation of the work of the Advisory Committee on Rules of Civil Procedure. There is, however, one error as to his statement of the present situation as to the proposed condemnation rule which should be noted. I have no doubt that he would have corrected this in his final draft, for his last letter to me, received after his death, was an inquiry as to the exact facts with respect to the point he was making thus showing his usual scrupulous concern for complete accuracy.

"As printed, however, the editorial assumes that adoption of the rule has been prevented by the intransigent attitude of the Tennessee Valley Authority in striving to preserve its method of trial by commission, instead of trial by jury, of the issue of just compensation. In fact this was not at all the case; indeed, quite the converse was true. It was because our recommendation may have unduly deprived other agencies of the benefits of the TVA method, as reported by district judges who have observed it in operation, that the Supreme Court re-referred the rule to our Committee for further consideration of the manner of trial of this issue.

"It should be said that outside of Mr. Armstrong and those who have accepted his vigorous views there has been practically no demand or suggestion for overturning the legislative policy as to this matter set forth in the TVA Act. (There may be question as to the number of successive appeals there permitted, but that is another matter.) Consequently all drafts have provided for the observance of a Congressional mandate wherever one exists. This provision has not been contested by the Department of Justice, which has urged only the adoption of jury trials in the cases not specifically covered by congressional act, that is, the cases particularly in its charge. Hence the present issue is more as to the possibility or desirability of extending the TVA system, rather than of eliminating it, as Mr. Armstrong thought. As suggested in my article in 10 *Ohio State Law Journal* 1—which was the occasion for the editorial—the solution may well be in greater flexibility in the authorized procedure, permitting the court to adjust the form of trial to the widely differing conditions under which federal condemnation may be had."

THE LAW SCHOOL of the University of Notre Dame is sponsoring a Third Natural Law Institute to be held in the auditorium of the College of Law, December 9 and 10. The program will consist of four main addresses: "The Natural Law and the Common Law", by Richard O'Sullivan, K. C., of London, England; "The Natural Law and Constitutional Law", by Professor Edward S. Corwin of Princeton University; "The Natural Law and Canon Law", by Dr. Stephan Kuttner of The Catholic University of America; and "The Natural Law and International Law", by Brigadier General Carlos P. Romulo, President of the General Assembly of the United Nations.

BAR ACTIVITIES

■ The English Bar has decided for the first time that its members should pay an annual subscription in order to finance an adequate secretariat for the Bar Council. Up to now the Council has been dependent for its support on the four Inns of Court, and individual barristers have not been assessed. Under the old plan the total income available was £2400 a year. It is estimated that the new arrangement will produce between £5000 and £6000 a year. Subscriptions, however, are entirely dependent on the honor of the members of the Bar who have assessed themselves at different amounts for juniors and King's Counsel. The Bar Counsel, like the Law Society for solicitors, is an entirely voluntary body and the State has no voice in its affairs.

The Law Society has a membership of over 14,000 members. There are some 16,000 practicing solicitors. An interesting argument for membership in the Law Society presented in dialogue form is to be found in the October number of *The Law Society's Gazette.*

Tom E. EASTMAN

■ Tom E. Eastman of Rapid City was elected President of the South Dakota State Bar at its annual meeting in September. R. C. Bakewell is the new Vice President and Karl Goldsmith, Secretary. Speakers at the annual meeting were Justice John V. Spalding, of the Supreme Judicial Court of Massachusetts, and President Harold J. Gallagher of the American Bar Association.

■ At the last session of the General Assembly of Illinois, the Chicago Bar Association and the Illinois State Bar Association employed a legislative secretary who coordinated the legislative programs of both associations. The results of this experiment were encouraging. Twenty-five out of forty proposals introduced were passed by the legislature.

The prestige of the associations increased and there is now a better understanding between the associations and the members of the General Assembly. A comprehensive report on this activity is to be found in the August-September number of the *Chicago Bar Record.*

■ Some three hundred members of the New York State Bar Association attended a joint meeting of the Banking Law Section and the Federation of Bar Associations of Western New York which was held in Rochester. President Harold J. Gallagher of the American Bar Association was the featured speaker. The morning and afternoon sessions were devoted to current banking problems. In the evening at the annual dinner, President Gallagher spoke on "Integration of Bar Associations" and stressed the need for a closer liaison between state and local associations and the American Bar Association.

■ In October the New York Citizens Committee on the Courts sponsored a luncheon as part of its program to secure the adoption in New York of the American Bar Association's plan for the selection of judges. Chief Justice Laurance M. Hyde of the Missouri Supreme Court was the principal speaker and told of the successful results following the adoption of the plan in Missouri. Morris B. Mitchell, Chairman of the American Bar Association's Special Committee on Judicial Selection, described the efforts in other states to secure the adoption of the plan.

The luncheon had extremely wide press coverage. There were a number of editorials in the newspapers and the New York *Herald Tribune* printed in full the text of Chief Justice Hyde's address. Off-print reproductions of the publicity may be obtained from the Citizens Committee on the Courts, Inc., 15 William Street, New York, New York.

Gerald P. HAYES

■ Gerald P. Hayes of Milwaukee was elected President of the Wisconsin Bar Association at its annual meeting in June. The Wisconsin Bar Association has completed its first year of operation with a full-time staff and central office. Membership is now over 2700. The Association has plans for legal institutes at ten regional meetings.

■ The Federal Communications Bar Association, which was admitted as an affiliated national legal organization by the American Bar Association's House of Delegates, honored at its annual fall outing Horace L. Lohnes, a former president. The officers of the association are Guil-

ford Jameson, President; Corwin R. Lockwood, Jr., Secretary; and Joseph F. Zias, Treasurer. The Association publishes a quarterly journal which goes to all its members.

■ Last year the Milwaukee Bar Association under the energetic leadership of President E. H. Hallows developed a well-conceived program which embraced public service activities, service to members, improvement of the administration of justice and public relations.

In the first field were such activities as the so-called Milwaukee Disbarment Bill which empowered the Association to file disciplinary proceedings directly in the Supreme Court; a bill to return to the Circuit Courts the power to call a grand jury; a revision of the Wisconsin corporation laws; and a poll on judicial candidates. As a service to its members the Association adopted a new minimum fee schedule, conducted an institute on constitutional law and the law of evidence and secured the institution of a title examination index file system.

In the field of judicial reform the Association presented to the legislature a modification of the American Bar Association plan for the selection of judges, a pension plan for state judges, and the Association took an active part in the creation of a children's court. All of these activities resulted in excellent radio and newspaper publicity. For further information on the Milwaukee Bar Association's program, write to L. G. Barnes, Wells Building, Milwaukee, Wisconsin.

■ The Annual Meeting of the Vermont Bar Association was held in October at Montpelier. Osmer C. Fitts of Brattleboro, President, delivered an address entitled "Revelations Telegenesis".

The recommendation of the Association's Committee on Jurisprudence and Law Reform for the continuation of *capias* process was adopted. The Legal Aid Committee was authorized to establish a legal aid office in one of the cities as an experiment and to report back to the next Annual Meeting. The Association rejected recommendation of a state-wide minimum fee service schedule for miscellaneous services but adopted the recommendation of a uniform minimum fee bill for collections and returned the matter to committee for the preparation of such a schedule.

The Canons of Ethics of the American Bar Association were adopted in lieu of the canons prepared for and adopted by the Vermont Bar Association in 1909. A report of the delegate to the National Conference of Commissioners on Uniform State Laws was presented by George M. Hogan, and a very exhaustive report on the Commercial Code being considered by the National Conference of Commissioners on Uniform State Laws and the American Law Institute was made by Sterry R. Waterman.

One of the highlights of the meeting was a panel discussion on the topic, "The Duty of a State Bar Association to the Public and to the Profession", presided over by A. Pearley Feen, a past President of the Association. The participants were President Harold J. Gallagher of the American Bar Association, Richard Wait, President of the Massachusetts Bar Association, Charles W. Pettengill, former President of the State Bar Association of Connecticut, James L. Taft, President of the Rhode Island Bar Association, and John W. Perkins, President of the Bar Association of the State of New Hampshire.

The Annual Dinner of the Association was addressed by President Gallagher, who explained the work of correlation he anticipates between the American Bar Association and the state bar associations and the appointment of correlating committees to be headed by the State Delegate of each state and requesting the appointment of a state bar association committee to collaborate with it. The Governor of Vermont, Ernest W. Gibson, brought greetings from the state. The principal address of the evening was given by General William J. Donovan of New York, who was head of the Office of Strategic Services during the war.

The newly elected officers of the Association are President, Norton Barber of Bennington; First Vice President, William H. Edmunds of Burlington; Second Vice President, Lawrence C. Jones of Rutland, and Third Vice President, Alban J. Parker of Springfield. Harrison J. Conant, Secretary, and George W. Hunt, Treasurer, were reelected. The new member of the Board of Managers elected for a three-year term is R. Clarke Smith of Rutland.

■ For several years The Association of the Bar of the City of New York has urged the New York State Legislature to propose an amendment to the Constitution of the State of New York which would prohibit anyone holding a judicial office in the state, from becoming a candidate for any office other than a judicial one without first resigning from the Bench. The present provision of the Constitution is that votes for judges of the Court of Appeals and justices of the Supreme Court for any other than a judicial office or as a member of a constitutional convention shall be void. At a regional meeting of the New York State Bar Association, held in connection with a meeting of the Federation of Bar Associations of the Fifth Judicial District, the proposal of The Association of the Bar received additional support from a decision made by the Executive Committee of the state bar association.

Noting that the Canons of Judicial Ethics provide that while holding a judicial position a judge should not become an active candidate either at a party primary or at a general election for any office other than a judicial office and that if a judge should decide to become a candidate for any office not judicial, he should resign in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party, it was the Executive Committee's judgment that the meaning of this canon is entirely

clear and applies to the judges of all courts in this state whether of limited or general jurisdiction. Further noting that there have been instances in various sections of the state where the canon has been and is being violated, the Committee disapproved and deplored any failure to observe this Canon and resolved that the Bench and Bar of this state be urged to strict adherence to the letter and spirit of this canon in order that the sound principles thereof may be firmly established.

At the meeting Weston Vernon, Jr. of New York City was elected as a delegate to the House of Delegates of the American Bar Association to fill the vacancy created by the death of Philip J. Wickser, of Buffalo.

Among those present was President Neil G. Harrison of Binghamton, New York, President of the New York State Bar Association.

■ Over 400 lawyers attended the 51st Annual Meeting of the Colorado Bar Association which was held at Colorado Springs in October. The Annual Banquet was addressed by Judge Charles E. Clark of the United States Court of Appeals for the Second Circuit. James K. Groves of Grand Junction took office as the new president.

The general business session on Saturday afternoon designated Edward G. Knowles of Denver to be President-Elect for 1950-51, and the following vice presidents were elected to serve this year with President Groves: Senior Vice President, Judge Alfred Arrah of Springfield; Vice Presidents, Albert S. Isbill of Denver, Hatfield Chilson of Loveland and Charles A. Petrie of Montrose.

Judge Clark in his address, as well as Judge Alfred P. Murrah of the Tenth Circuit, who spoke at the Saturday luncheon, laid great stress on the long and arduous work required to put judicial tribunals on a businesslike basis.

The Colorado Bar Association's new annual award of merit was presented by President William Hedges Robinson to Philip S. Van Cise of Denver for his untiring efforts as chairman of the Judiciary Committee.

Announcement was made that the American Bar Association's Award of Merit, presented annually to the state association which has demonstrated the greatest progress and activity, had been won by the Colorado Bar Association at St. Louis in September.

A. M. MULL, Jr.

Keeley Studio

■ The State Bar of California under the leadership of President A. M. Mull, Jr., of Sacramento, has taken steps to move ahead on five fronts since the annual convention in September:

1. In Continuing Education of the Bar, lecture courses will be held in sixteen cities throughout the state on legal draftsmanship.

2. In Public Relations, the State Bar will encourage the reorganization of local bar associations into effective instruments to carry the story of the profession to public forums, over the radio and in the press.

3. In Improving the Administration of Justice, the State Bar has begun to plan its constitutional amendment campaign set for November, 1950, to reorganize and simplify the state's cumbersome system of inferior courts. The proposals will make two classes of such courts where six now exist, eliminate jurisdictional snarls, and generally elevate the courts.

4. On the broader basis of public understanding, the State Bar has sponsored the writing, editing and publishing of an Introduction and Guide to the History of the Bench and Bar in California in cooperation with scholars and a committee of distinguished lawyers. The volume will be ready before the end of 1950 as a contribution to the centennial celebrations in California.

5. Finally, through the agency of the Conference of Junior Bar Members, the State Bar is encouraging the participation of young members in both the local and state bar work. Among other things planned is a school speaking program which already has won recognition in many school systems.

Henry P. DART, Jr.

■ At the Eighth Annual Meeting of the Louisiana Bar Association in Baton Rouge in May, Henry P. Dart, Jr., of New Orleans, was elected President. Mr. Dart has been a member of the American Bar Association since 1908, and has served in the House of Delegates of the American Bar Association.

Principal speakers at the Annual Meeting were President Frank E. Holman, Major General Thomas H. Green, Judge Advocate General of the Army, and Dr. Harold W. Stoke, President of Louisiana State University.

The Annual Meeting adopted a resolution favoring the establishment of an administrative court and also approved recommendations that the salaries of Justices of the Supreme Court of Louisiana be increased to $17,500.

Proceedings of the Assembly:

1949 Annual Meeting

■ This is a complete summary of the proceedings of the Assembly of the American Bar Association at the 1949 Annual Meeting in St. Louis, Missouri. It contains a summary of the debates on the floor of the Assembly and the text of resolutions passed by the Assembly that were not included in the report of the proceedings of the House of Delegates published in the November issue of the *Journal*, 35 A.B.A.J. 947. There were five sessions of the Assembly, not counting the Annual Dinner, at which the members of the Association who registered for the Annual Meeting heard many interesting speakers, including General Dwight D. Eisenhower, Lord Morton of Henryton, Chief Justice Fred M. Vinson and Frank E. Holman, the President of the Association.

■ The first session of the Assembly of the American Bar Association at its 72nd Annual Meeting in St. Louis, Missouri, was called to order at 10:00 A.M. on September 5, 1949, by President Frank E. Holman in the Kiel Auditorium.

Mr. Holman introduced Joseph A. McClain, Jr., of Missouri, the Chairman of the General Convention Committee, and R. Forder Buckley, President of the St. Louis Bar Association. Mr. McClain delivered the address of welcome, to which Cody Fowler of Florida responded on behalf of the Association. The Secretary of the Association, Joseph D. Stecher of Ohio, then took the chair to introduce Mr. Holman, who delivered the President's Annual Address, which was published in the October issue of the JOURNAL (35 A.B.A.J. 801).

Following the President's address, one of the distinguished visitors, the Right Honorable Lord Morton of Henrytown, K. C., P. C., was introduced.

Association Receives Stones from Inner, Middle Temples

George Maurice Morris of the District of Columbia then presented to the Association two stones from the Inner and Middle Temple Halls. The stones, he explained, were torn from the buildings during the Nazi air raids on London, and had been sent to the Association by Eric Underwood. The stones were accompanied by certificates telling of their origin, signed by the Treasurers of the two Inns. The Lord Chancellor, Viscount Jowitt, wrote the following letter concerning the stones:

> These stones were for many years part of the structure of the Temple. They were torn from their resting place by the bombs of totalitarian tyranny.
>
> May they be a symbol of the virtues and the graces for which the Inns of Court have stood throughout their long history, virtues and graces for which, by God's grace, they will ever stand.
>
> These stones have witnessed the struggle to defeat tyranny and to bring about that ordered freedom within the law by which alone we can secure that all men shall have impartial justice meted out to them. Our forefathers died to establish this ideal. Our brothers and our sons in their generations died to maintain it.
>
> May this principle so bravely established and so bravely maintained long survive our present difficulties, for on this principle alone can we construct the firm foundations of a Christian civilization and build a solid support for our way of life.
>
> Though our buildings perish, our traditions remain, so that, in the words of Horace, we may claim *"Monumentum exegi aere perennius"*.

President Holman said that the stones would be incorporated in the proposed new headquarters building of the Association when it becomes a reality.

The following members presented resolutions, which were referred to the Committee on Resolutions: Jacob T. Basseches of New York, Dorothy Frooks of New York, Richard Tinkham of Indiana, Carl B. Rix of Wisconsin, Arnold C. Otto of Wisconsin and George E. Morton of Wisconsin.

Association Endowment Holds Meeting

President Holman then relinquished the chair to Jacob M. Lashly, President of the Board of Directors of the American Bar Association Endowment. Opening the annual meeting of the Endowment, Mr. Lashly reported that the Endowment had a cash balance of $315,279.85 as of August 22, 1949. In the administration of the estate of the late Wil-

liam Nelson Cromwell of New York, he explained, the Association had been awarded three portions of ninety-three parts of the residuary estate, and that the portions amounted to about $150,000 each, of which about $300,000 has been received. He read appropriate portions of the purpose clause of the Endowment and of Mr. Cromwell's will, and said that no definite report as to what the Endowment should do with the funds was available yet, pending advice of counsel and a conference of the Directors.

Thomas J. Guthrie of Iowa and Frank E. Holman of Washington were elected to five-year terms on the Board of Directors of the Endowment, succeeding themselves. William A. Sutherland of the District of Columbia was elected to the Board for the term ending in 1951 to fill the vacancy caused by the death of Philip J. Wickser.

Candidates for Assembly Delegate Are Nominated

The meeting of the Endowment adjourned and the Assembly then reconvened. The following were nominated for the office of Assembly Delegate, with five to be elected: Ronald J. Foulis of Missouri, W. E. Stanley of Kansas; Kenneth Teasdale of Missouri, Loyd Wright of California, Edwin M. Otterbourg of New York, John W. Guider of New Hampshire, Cody Fowler of Florida, Morris Mitchell of Minnesota, T. Julian Skinner of Alabama, Floyd E. Thompson of Illinois.

The Assembly recessed at 12:15 P.M.

SECOND SESSION

■ The second session convened at 2:00 P.M. to hear Gen. Dwight D. Eisenhower. His address was printed in the October, 1949, issue of the JOURNAL (35 A.B.A.J. 810).

THIRD SESSION

■ The third session of the Assembly convened at 2:00 P.M. Wednesday, September 7, with the President in the chair.

Chief Justice Fred M. Vinson was presented to the Assembly, and Jacob M. Lashly of Missouri reported on the journey to France and Italy taken by him and Mr. Holman to present American law libraries to the lawyers of those countries. A complete account of this was printed in the September issue of the JOURNAL (35 A.B.A.J. 717).

President Holman then introduced Stanley H. McCuaig, Immediate Past President of the Canadian Bar Association, who spoke to the Assembly. The text of his address was printed in the November, 1949, issue of the JOURNAL beginning at page 901.

At the conclusion of Mr. McCuaig's address, resolutions were read to the memory of three members of the Association whose deaths during the year were a great loss to the American legal profession: Judge William L. Ransom, Walter P. Armstrong and Philip J. Wickser.

Memorial Is Read for Judge Ransom

Secretary Stecher read the resolution in memoriam to Judge Ransom:

"Our great friend Judge Ransom died suddenly from a heart attack on February nineteenth last in his sixty-sixth year. Knowing that—in his own phrase—'the axe might fall at any time' he had resolved to devote the remainder of his life to the progressive development of international law and when death came he was at work with a distinguished group of international authorities who had convened in the Root Room at the Harvard Law School.

"No man of our generation has rendered more faithful or more effective service to the American Bar Association and to the legal profession. As our President in 1936 he accomplished the reorganization which created the House of Delegates, and made the Association truly representative of a substantial majority of all the lawyers in the United States.

"Because writing was as natural to him as breathing it was inevitable that his energy should next be directed to upbuilding the AMERICAN BAR ASSOCIATION JOURNAL, of which he became Editor-in-Chief and which, under the spur of his genius, became the most influential legal periodical in the world.

"Before World War II had ended he had joined that then relatively small group of men who believed that the sacrifice would be in vain unless the reign of law could be established as the essential part of a peace following victory. When the House of Delegates in February, 1944, created a special committee to advise it on these fundamental and complex postwar problems, it turned to Judge Ransom for leadership and for five full years, almost to the day, he gave unstintingly of his physical strength and moral energy to the advancement of international justice according to international law.

"Because of his manifold services, of which the foregoing are only the high spots, the Association conferred on him its highest honor and at our annual meeting in Cleveland two years ago he was awarded the Gold Medal for Distinguished and Meritorious Service.

"These facts are well known to all of us; but, in addition, Judge Ransom was active in other fields with which we are less familiar because although outspoken on issues he was always reticent about himself. Thus, for example, the Academy of Political Science in May, 1949, adopted a memorial resolution from which we learn that he had served on the Academy's governing board for thirty-three years, had presided at annual meetings and had thrice edited its official publications. The following sentence in the resolution will surprise none of us—'His participation in the work of the Academy was never perfunctory'.

"Inasmuch as he was a fearless protagonist and could be a tough antagonist the gentler and truly affectionate side of his character tended to be concealed—and he probably wished it so. Outside of his family, this revealed itself most clearly in his solicitude for the welfare of the on-coming generation

of lawyers, those who had just entered the profession and those still at law school.

"A group of students at the University of Virginia Law School edit and publish for the library a little magazine called *Reading Guide*. No member of this group had ever met Judge Ransom but somehow he had found time to write them words of encouragement. Their March, 1949, issue contains an editorial entitled 'William L. Ransom' which states:

> "To us he has made himself, unwittingly, a friend and a sustaining influence.
>
> "As students, we inevitably have our attention directed to many men of eminence and affairs and we may harbor the ambition to attain like prominence but, thanks to Mr. Ransom, none of us is likely to forget that distinction in professional life is not only compatible with, but is immeasurably enhanced by a generous humane spirit and unaffected impulses toward the encouragement of others."

Walter Chandler Reads Memorial for Mr. Armstrong

Walter Chandler of Memphis, Tennessee then read the following memorial resolution in honor of Walter P. Armstrong:

"Walter Preston Armstrong, sixty-fifth President of the American Bar Association, outstanding American lawyer, brilliant scholar, and distinguished citizen, died suddenly on July 27, 1949, while engaged in the trial of a lawsuit. The summons came in a court room in Memphis, and at the height of his career.

"A native of Mississippi, Walter P. Armstrong would have been sixty-five years of age on October 26. He was splendidly educated, attending the famous Webb School at Bell Buckle, Tennessee, the University of Mississippi, and Yale University, where he graduated with a Bachelor of Arts degree in 1906, and with the degree of Bachelor of Laws, *magna cum laude*, in 1908.

"Entering the practice of law at Memphis, Walter Armstrong developed into one of the ablest trial lawyers, counsellors, and appellate court advocates in the history of the bar of the South. Gifted with exceptional native ability, extraordinary talents, and untiring energy, he acquired an unusual grasp of the law as a science and as a profession. In the preparation of his cases, he was superb, and in the presentation of them to court and jury with much forensic skill, he was remarkably successful. He also had the faculty of protecting his clients' rights with extreme vigilance while retaining the esteem of his professional brethren. At the time of his death, he was senior member of the well known firm of Armstrong, McCadden, Allen, Braden & Goodman.

"Walter Armstrong richly deserved the national reputation which was accorded him as a lawyer. After serving as President of the Memphis and Shelby County Bar Association and the Bar Association of Tennessee, he was honored in 1941 by election to the presidency of the American Bar Association. He had been increasingly active in the Association's work, with membership on the General Council, the Executive Committee, the House of Delegates, the Committee on Jurisprudence and Law Reform, (of which he was chairman from 1935 to 1941), the Commission on Uniform State Laws, and the Board of Editors of the AMERICAN BAR ASSOCIATION JOURNAL; and his term as President was marked by notable progress, exceptional interest, and added good will for the Association. He extended its usefulness and influence, and the effects of his work will be felt for a long time.

"Among Walter Armstrong's greatest contributions to the Bench and Bar of America were those made as one of the editors of the JOURNAL from 1934 to the time of his death. There, his resourceful mind, his wealth of knowledge of facts and persons, and the versatility of his accomplishments appeared vividly in his classical articles on legal and biographical subjects, his book reviews, and challenging editorials. Indeed, in the seventy-one years of American Bar Association history, no man has excelled Walter Armstrong in priceless contributions to the JOURNAL. His viewpoint was progressive and farseeing, his style of writing vigorous and stimulating, and his research boundless and convincing. And when an especially impressive and pleasing speech was in order in the Association, Walter Armstrong was often chosen for the occasion.

"As a citizen, Walter P. Armstrong responded repeatedly to calls for civic duty. A student of history, he was on the Tennessee Historical Commission; and being keenly interested in the advancement of jurisprudence and the simplification and restatement of the law, he was on the Council of the American Law Institute. His services as a member of the special committees of the Supreme Court of the United States, first in connection with the adoption of the Federal Rules of Procedure and, subsequently, with the revision of those rules, were noteworthy. Quite recently, he was appointed by The President one of the Federal Board of Legal Examiners, and was a member of the committee designated by Congress to suggest revision of court-martial procedure. In recognition of his professional leadership and scholarship, Boston College in 1942 and Southwestern College in 1943 conferred on him the honorary degree of Doctor of Laws.

"Aside from a temporary assignment as Assistant Attorney General of the United States under the Selective Service Act, Walter Armstrong held only one public office, that of City Attorney of Memphis from 1920 to 1924, but it is known that he probably would have been appointed Solicitor General of the United States in 1933 except for the unexpected death of the Honorable Thomas J. Walsh, the Attorney General designate.

"The debt of gratitude which the Bench and Bar owe to Walter Armstrong must stand. It cannot be paid. When one's scope of endeavor includes not only the daily obligations of the lawyer to the public, but spreads over the fields of literature, history, political science, and the

promotion of the legal profession for the benefit of its members, such a place cannot be filled by one man. There must be volunteers to carry on in his train. This, many are not equipped to do, but all can join in heartfelt appreciation of Walter Armstrong's fine gifts of talent and learning and service and loyalty to the advancement of the law and the perpetuation of those ideals of order and justice which have made our nation great and kept it free.

"So passes Walter Preston Armstrong, leaving behind him a cherished memory, a stirring example, and a trail of glowing light by which may be seen the way to the furtherance of the tasks of our calling in our time."

Harold J. Gallagher Reads Memorial for Mr. Wickser

The resolution to the memory of Philip J. Wickser was read by Harold J. Gallagher of New York:

"At the conclusion of this convention Philip J. Wickser was to have assumed office as the 73d President of the American Bar Association. It is a tragic and most distressing thing that, by reason of his untimely death at his summer home at Siasconset, Massachusetts, on August 14, 1949, we can now only pay tribute to his memory and recall some of the splendid qualities and accomplishments of one who for more than twenty-five years was a loyal, devoted and extremely active member of this Association.

"He was born in 1887 in Buffalo, New York, which was his home throughout his life. After receiving an A.B. degree from Cornell University in 1908, he studied at the Harvard Law School, where he was given an LL.B. degree in 1911. He returned to Buffalo and started his practice with the firm of Kenefick, Cooke, Mitchell and Bass. In 1915 he became a member of the firm of Palmer, Houck and Wickser, engaged in general corporate practice, specializing in trust, estate and insurance law. He married Margaretta Fryer that same year and they became the parents of three children.

"Phil Wickser was a man of many interests, but next to his family, his greatest devotion was to the law and its profession. Very early in his career he began rendering selfless service to his profession, striving to improve its educational standards and the administration of justice, as he was to do with increasing interest and success throughout his life.

"To forward these aims he became active in bar association work, joining this Association in 1923. He became President of the Bar Association of his home county of Erie in 1926. Shortly thereafter, recognizing the need of a closer association between local associations for accomplishment of effective results, he became the founder and first President of the Federation of Bar Associations of Western New York, a federation embracing sixteen counties. This federation, organized under a representative plan, was widely followed in New York State and other parts of the country and constituted the precedent on which the present representative government of this Association, through its House of Delegates, was founded.

"With his experience in the Federation of the Bar Association of Western New York, he became Secretary of the American Bar Association Committee on Coordination when that committee was first appointed in 1930 for the purpose of bringing the American Bar Association and its work into closer contact with lawyers throughout the country. This had been the subject of much thought by members and officers for some years prior to 1930 and several of the past presidents had discussed it in their annual address. Elihu Root at the time the Bar Association Medal was awarded to him in 1930 stated that 'to weld together all the separate bars of our several states into one body of common understandings and common sympathy and common purposes, inspired by the spirit of public service, is essential to the perpetuation of the American system of justice and to enable the administration of the law to keep pace with the rapid change of life in our country'. From that time onward, Phil Wickser dedicated himself with wholehearted devotion to the cause of coordination until his dreams and ambitions were realized in 1936 when the new Constitution was adopted providing for the creation of a House of Delegates, in which sat representatives appointed by the state and local bar associations. He was at all times the driving and inspirational force behind this movement. He believed in it thoroughly and it is not too much to say that without his tireless and devoted service during the more than five years in which the campaign of education, planning and effort was carried on, it would not have been possible to have accomplished this extraordinary change in the Association's structure in the single year of the dynamic presidency of the late revered Honorable William L. Ransom.

"His experience and background in the American Bar Association was most extensive. In addition to serving as Secretary of the Committee on Coordination, he was successively Chairman of the National Conference of Bar Examiners; Chairman of the Conference of Bar Association Delegates; member of the Rules and Calendar Committee of the House of Delegates; Chairman of the Public Relations Committee; member of the Board of Governors and of the Budget Committee, of which he acted as Chairman in 1942; member of the Committee on Coordination of War Effort; Chairman of Civilian Defense Committee; Chairman, Ways and Means Committee; member of the Special Committee on Peace and Law Through United Nations; Chairman of the Resolutions Committee and a Director of the American Bar Association Endowment.

"He held an abiding interest in legal education and the young lawyer. Many a member of the Erie County Bar owes much of his professional ability and character to Phil's habit of giving his evenings to informal discussions with the juniors of his calling. He served as a member

of the Council of the Section of Legal Education of this Association. From 1921 until his death, he was a member of the New York State Board of Law Examiners, for many years its Secretary and for the past two years its President. His was a notable contribution, together with his distinguished colleagues, in raising the standards of bar examinations and in placing the emphasis on the candidates' ability of legal analysis and reasoning rather than merely memory tests. He was Chairman of the National Conference of Bar Examiners in 1931 and a member of the Board of Legal Examiners, Federal, 1941 to 1943.

"With his nomination for the presidency of this Association in February, 1949, he realized the highest ambition of his life. He saw a further opportunity to render service to the profession he loved. Had he been spared, he would have made a great contribution to the work of the Association during the coming year. We have lost much in losing his genius of organization and his great capacity for generating ideas and carrying them into effect.

"Phil Wickser was not only learned in the profession of the law and tireless in its service. As has been said, he had many interests. He was a devoted student of music, art and literature. In the true sense, he was a student and a scholar. He loved his family, his friends, his books and his paintings. As a collector of rare first editions of the Thomas Hardy period he took great pleasure and delight in exhibiting them to the friends who were fortunate enough to sit with him in the oval library of his home. He had an imaginative and creative mind and a keen and witty sense of humor. He strove constantly to discover better ways to do things better. He was a perfectionist—never satisfied to say, 'That's good enough'. He did not, therefore, easily relax. It was this intensity perhaps which contributed to his premature death.

"He was active in business, public and civic affairs of his city and state. As Chairman of the Board of the Buffalo Insurance Company and Director of the Marine Trust Company, he displayed a keen knowledge of investments and his services were sought as an executor and trustee of large estates. Although a Republican, Governor Roosevelt called upon him because of his well known interest in philanthropic causes to act as one of the three members of the Temporary Relief Administration created in 1931 to deal with the urgent relief problems then existing in the State of New York. He was its Chairman in 1932. He served from 1934 to 1936 as Vice Chairman of the Governor's Commission on Unemployment Relief. He was a director of the Buffalo Society of Natural Sciences, Buffalo Fine Arts Academy, Buffalo Historical Society, Trustee and Secretary of the Grosvenor Library at Buffalo, Director of the Urban League and Memorial Center of Buffalo, and Vice President of the Kleinhaus Music Hall Incorporated of Buffalo. He was also a Director of the Children's Aid Society of Erie County, and was its President from 1928 to 1942.

"He represented the best traditions in the profession, in the public service, and in all cultural and philanthropic causes to which he so unselfishly devoted himself throughout his life. The members of the American Bar Association owe a continuing debt of gratitude to Phil Wickser for his long and faithful services which, to the extent within their power, they happily recognized in choosing him President for the year 1949-50. We shall forever honor and cherish his memory and deplore his passing."

President Holman then turned the chair over to James R. Morford, of Delaware, Chairman of the House of Delegates, to preside while the Assembly considered proposed amendments to the Constitution and By-Laws of the Association.

Mr. Morford, after recognizing the presence of a quorum of at least 200 members, called upon Roy Willy of South Dakota, Chairman of the Committee on Rules and Calendar of the House of Delegates, to present the question.

Mr. Willy explained that this was the first major change in the structure of the Association proposed since 1936. He said that the Association has increased materially in size and functions during the last thirteen years, and that the proposed amendments would provide a sounder base for the structure of the organization. They do not in any way alter or change the basic purpose of the Association, he noted. The amendments were to be found, he said, on pages 43 to 65 of the Advance Program in the form in which they were approved by the House of Delegates at the Mid-Year Meeting. He declared that there was only one slight change that should be made, and, accordingly, he moved that the form of Article X of the Constitution, approved by the House, be changed so that the name of the Section of Corporation, Banking and Mercantile Law would become "Section of Corporation, Banking and Business Law". The Assembly voted to make this change.

Assembly Votes Approval of Amendments

Mr. Willy then moved that the Assembly adopt the amendments to the Constitution appearing on pages 43, 44, 45 and 46 and on page 49 of the Advance Program. The motion was regularly seconded and was carried.

Chairman Morford declared that more than the necessary constitutional majority of two-thirds had voted in favor of the amendments to the Constitution and that they were thereby adopted. A summary of these amendments appeared in the May, 1949, issue of the JOURNAL (35 A.B.A.J. 411).

Mr. Willy then moved that the changes in the By-Laws of the Association as published be adopted by the Assembly. The motion was carried, and the amendments to the By-Laws were declared adopted.

Mr. Willy then moved that the By-Laws be further amended to provide a new Section 4 of Article I, creating a class of patron members.

The Assembly voted to adopt this amendment, the text of which will be found in the report of the House (35 A.B.A.J. 948; November, 1949). The complete text of the new amendments to the Constitution and By-Laws appears on the pages above referred to of the Advance Program.

Mr. Willy also explained that the amendment to the By-Laws proposed by Adrian M. Unger of New Jersey, published at page 681 of the August issue of the JOURNAL (35 A.B.A.J. 681), which would have changed the method of electing members to the Association, had failed of passage in the House of Delegates (35 A.B.A.J. 949; November, 1949), and that there was nothing to come before the Assembly in relation to this proposal.

Committee on Resolutions Makes Its Report

President Holman then resumed the chair, and the Assembly took up the report of the Committee on Resolutions, presented by Glenn M. Coulter of Michigan.

He said that eleven resolutions had been presented and, after public hearings on them, the committee now made its recommendations. The Assembly took up the resolutions one at a time.

The following resolution, presented by Charles Ruzicka of Maryland, recommended for adoption by the Resolutions Committee, was adopted by the Assembly without debate:

> RESOLVED, That the President of the American Bar Association be and he is hereby authorized and directed to appoint a Special Committee to inquire into the propriety of members of the Judiciary appearing and testifying in criminal and civil cases, and that such Committee submit its report, findings and recommendations to the Board of Governors before the mid-winter meeting of the House of Delegates in 1950.

A resolution had been presented by Dorothy Frooks of New York that would have condemned the practice of picketing federal courts, and pledging the Association to seek legislation to prohibit such picketing. Mr. Coulter said that the committee recommended that the resolution be not adopted, not because of its content or purpose, but because the Assembly had theretofore condemned such practices and that legislation was far advanced in the Congress dealing with the problem. The Assembly voted to approve the recommendation of the committee.

Public Relations Resolution Is Introduced

The next resolution, introduced by Richard P. Tinkham of Indiana, would have had the Association set up a program of public information, designed to inform the public of the value and the place of the lawyer in our civil and economic system, and of the services that lawyers are able to perform. The committee recommended that the resolution be adopted, with some changes by the committee that had Mr. Tinkham's approval.

George M. Morris of the District of Columbia, Chairman of the Public Relations Committee, spoke on the resolution. He said that it was an encouraging proposal, but that he did not favor adoption of the resolution. He pointed out that the Survey of the Legal Profession was progressing rapidly, and said that the Public Relations Committee hoped to use that as a basis for a long-term program of public relations, and pointed out that only a long-term program, which depended upon knowledge of the present status of the profession, would be adequate. He said that the committee had therefore been confining its effort for the present to assisting state and local bar associations in their own public relations programs. He moved that the resolution be referred to the Public Relations Committee for study and report.

The motion to refer to the committee was carried.

Experienced Justices Subject of Next Resolution

The fourth resolution was offered by Loyd Wright of California, and was presented by the committee in the form of a resolution differing somewhat from Mr. Wright's proposal. It would have favored a constitutional amendment requiring appointees to the Federal Bench to have been actually engaged in the practice of the law for at least fifteen years prior to appointment, or to have served on the Bench of a state court of original or appellate jurisdiction during that period of time prior to appointment. The resolution would also have urged the President to disregard political affiliations in making judicial appointments, and to recognize judicial service and ability.

Mr. Coulter moved adoption of the resolution as revised by the committee.

Mr. Wright Moves To Amend Language of Resolution

Mr. Wright said that he was not in favor of all the changes in his proposal made by the committee and he moved to substitute a new paragraph in the resolution for the paragraph dealing with political affiliations. The effect of Mr. Wright's substitution would have been to amend the Constitution so as to require the President to disregard political affiliations in making appointments.

John G. Buchanan of Pennsylvania declared that the same problem had often arisen in the House of Delegates, and that many hours had been spent debating it. He said that nine out of the eleven members of the Committee on the Judiciary, which had considered the problem often, had always felt that the proposals could not be effective as constitutional amendments, and might prove unduly restrictive. He moved that the whole subject matter of the resolution be referred to the Committee on the Judiciary.

Mr. Wright, speaking to the substitute motion, said that the Assembly was supposed to be the American Bar Association, and that if the committee were going to act, it would have done so long ago.

Mr. Buchanan, closing the discussion, asked that the question, defeated several times in the committee, be not decided by the small number in attendance at the Assembly

who were hearing the matter for the first time.

The Assembly voted to refer the matter to the committee.

Fifth Resolution Dealt with Association Home

The fifth resolution had been presented by Arnold C. Otto of Wisconsin. In substance it provided for establishing a home for the American Bar Association and the receiving of contributions therefor. The Resolutions Committee recommended that the resolution be not adopted in view of the well advanced plans of the Committee on Ways and Means for building a new Headquarters building.

Mr. Otto moved that his original proposal in its amended form be substituted and adopted by the Assembly. Mr. Otto read his resolution and recalled the letter from the member of the American Pharmaceutical Association to President Holman, printed in the April issue of the JOURNAL, 35 A.B.A.J. 282. He urged the Assembly to adopt the resolution.

The Assembly voted to reject Mr. Otto's resolution and in favor of the recommendation of the committee.

Proposes Study of Social Security

Resolution No. 6 was presented by George E. Morton of Wisconsin, and proposed that the President of the Association appoint a committee of lawyers to make a study of social security and its proposed extension, and report whether such a national policy conflicts with the maintenance of constitutional government in the United States. Mr. Coulter said that the Committee on Resolutions recommended that the resolution be not adopted because its subject matter has frequently been a matter of action by the Assembly and is now under consideration by other bodies of the Association.

Mr. Morton, speaking in favor of the resolution, said that it was offered with no political purpose in mind, but that he felt that the lawyers are leaders of thought in the United States and "as a body of leaders of the nation's thought, . . . we should have a report . . . as to whether or not such a policy of government is consistent with the maintenance of constitutional government, as I believe it is not". He said that "we have never in the world's history seen a government that supported its people and left them free". He moved that the resolution be referred to the Public Relations Committee.

The motion of referral was lost, and the Assembly voted to adopt the recommendation of the Resolutions Committee.

Mr. Coulter said that the seventh resolution had been submitted by Mr. Morton, but had been withdrawn by him.

Eighth Resolution Opposes Socialized Medicine

The eighth resolution had been proposed by Roy Willy of South Dakota, and would have put the Association on record as opposed to any legislation that subjects the practice of medicine to federal control and regulation beyond that now imposed under the system of free enterprise.

The committee recommended that this be not adopted because the subject matter had already been endorsed by the Assembly, and the Board of Governors and House of Delegates have advised themselves from these prior resolutions. The resolution lost upon a vote in the Assembly.

The next resolution was proposed by Robert B. Ely III of Pennsylvania, and would have had the Association recommend that the United States take suitable actions, in conjunction with other members of the United Nations, looking toward the establishment of permanent international tribunals under the International Court of Justice with compulsory appellate jurisdiction over questions of international law affecting civil rights and the duties of individuals.

The committee recommended that the resolution be not adopted, because its subject matter already has been considered or is under consideration by appropriate committees and Sections of the Association. The Assembly voted to adopt the committee's report and recommendation.

The next resolution was submitted by Joshua Edmund James of Virginia, and complained against practices of nations signing peace treaties with various belligerents, and adopting as final the practice of using "force" in the settlement and language of such treaties instead of the principles of legal and equitable adjustment.

The committee recommended that the resolution be not adopted because it was ambiguous and uncertain in its phraseology, and was already being considered by appropriate committees and Sections of the Association.

The Assembly voted not to adopt the resolution.

Assembly Urges Support of Hoover Report

Resolution No. 11 reads as follows:

> WHEREAS, Congress clearly recognized the necessity for government reorganization when it unanimously created the bi-partisan Commission on Organization of the Executive Branch of the Government in July, 1949, and
>
> WHEREAS, Chairman Herbert Hoover and the members of the Commission admirably and efficiently performed their duties of investigation and made specific recommendations concerning:
>
> (1) The elimination of expenditures to the lowest amount consistent with efficient performance, the elimination of duplications and overlappings, and the consolidation of such services, activities and functions of a similar nature;
>
> (2) The elimination of services, activities and functions unnecessary to efficient government;
>
> (3) Definition and limitation of executive functions, services and activities, and
>
> WHEREAS, There is a universal demand for such economy and efficiency in government by thoughtful, public-spirited men and women throughout the United States, and
>
> WHEREAS, The Commission's report promises lasting benefit to all citizens, not only in terms of economy and efficiency but also in terms of the ef-

fective use of our resources, human and material, in the cause of world peace and progress; now therefore be it

RESOLVED, That the American Bar Association urge Congress to make effective the recommendations of the Commission by enacting appropriate legislation.

The resolution was submitted to the committee by the Board of Governors, acting upon a suggestion from several sources that the Association endorse the recommendations of the Bi-Partisan Commission on Organization of the Executive Branch of the Government. Upon recommendation of the Committee on Resolutions, the Assembly voted to adopt the resolution.

The Assembly then recessed at 5:30 P.M.

FOURTH SESSION

■ At the fourth session, which convened at 8:00 P.M., September 7, the Right Honorable Lord Morton of Henryton addressed the members of the Assembly. The text of his address was printed in the November issue of the JOURNAL at page 889.

FIFTH SESSION

■ The fifth session convened at 2:10 P.M., Thursday, September 8, with President Holman in the chair. Glenn M. Coulter, Chairman of the Committee on Resolutions, presented the following resolution:

WHEREAS, Justice Wiley B. Rutledge of the United States Supreme Court is seriously ill and engaged in a heroic struggle for the recovery of his health, therefore be it

RESOLVED, That the Secretary of the American Bar Association is directed to transmit to Justice Rutledge the regards of the Association and its sincere wishes and profound hope for a speedy recovery and many years of continued service on our nation's highest court.

Out of respect to Mr. Justice Rutledge, the Assembly adopted the resolution unanimously by a rising vote.

F. M. Sercombe of Oregon, Chairman of the Committee on Award of Merit of the Section of Bar Activities reported for the committee. He announced that the Ohio State Bar Association was the winner in the division for large state bar associations, and presented the award to Waymon B. McLeskey, past president of the Ohio State Bar Association, as its representative. Mr. Sercombe said that the Michigan State Bar Association and the New York State Bar Association received honorable mention in this division.

The winner of the small state bar associations division was the Colorado State Bar Association, Mr. Sercombe said.

The Columbus (Ohio) Bar Association was given the award for larger local bar associations. Earl Morris received the award for Frank Dunbar, of the Columbus Bar Association. The Milwaukee Bar Association was awarded honorable mention in this division. Mr. Sercombe said that the Philadelphia Bar Association and the Alameda County Bar Association also deserved high praise for their activities.

The Beverly Hills Bar Association won the award for local associations serving populations of under 100,000, and the award was presented to Lon Brooks, its president, as its representative. The Greensboro (North Carolina) Bar Association won honorable mention in this division.

Ernest Wilkerson of Wyoming was then presented with the 1949 Ross Essay Award, and read a summary of his winning paper. The entire essay will be published in a later issue of the JOURNAL.

Secretary Stecher then announced the following results in balloting for the office of Assembly Delegate:

Elected for three-year terms:

CODY FOWLER, Tampa, Florida

LOYD WRIGHT, Los Angeles, California

T. JULIAN SKINNER, JR., Jasper, Alabama

W. E. STANLEY, Wichita, Kansas

FLOYD E. THOMPSON, Chicago, Illinois

Victor D. Werner of New York, was introduced by the President to make a statement for the Committee on Participation by Lawyers as Citizens in Public Affairs, of which he was chairman. He gave a short history of the purpose, activity and future program of the committee. He declared, "Having in mind that the concept of our government is a government by constitutional law and order, it is of vital importance to us as lawyers whose business is law and order to take the leadership in encouraging the members of our profession and our fellow citizens to take part in government, politics and public affairs. When we come right down to it, government is politics. Politics and politicians control and run government. Whether we like it or not our right to freedom and liberty depends upon our participation in this thing called 'politics'. Our salvation rests upon our interest and activity in politics and public affairs."

He spoke of the Citizenship Clearing House, founded by Chief Justice Vanderbilt and sponsored by the Association and the New York University School of Law, and told of its work.

He said, "Whether we realize it or not, we are presently engaged in the fight to preserve our form of government and avert socialism, communism or some other foreign ism. . . . The foundation, the hope of the future and the effectiveness, yes, even the very existence of this great American Bar Association is dependent upon the grass roots education of our people". That is the work of the Committee, he said, and no project of the Association is more important in these days.

The President then introduced Robert F. Maguire of Oregon, who delivered an address entitled, "The Unknown Art of Making Peace", which was printed in the November issue at page 905.

John R. Snively of Illinois then presented the report of the Committee on Traffic Court Awards of the Section of Criminal Law. He made the following announcement of awards:

Group I—Cities with a population of 500,000 or more

Honorable mention—Los Angeles, California

Group II—Cities with a population of 200,000 to 500,000

First place—Kansas City, Missouri

Second place—Oakland, California

Honorable mention—Portland, Oregon

Group III—Cities with a population of 100,000 to 200,000

Honorable mention—Grand Rapids, Michigan

Group IV—Cities with a population of 50,000 to 100,000

Tied for First Place—Lincoln, Nebraska, and Charleston, West Virginia

Group V—Cities with a population of 25,000 to 50,000

Honorable Mention—Oak Ridge, Tennessee

Group VI—Cities with a population of 10,000 to 25,000

First Place—Montclair, New Jersey

Second Place—Redlands, California

The Assembly then adjourned *sine die* at 4:00 P.M.

The Compleat Counsellor

(Continued from page 982)

every American lawyer of a century or even half a century ago who had read the opening chapters of the first volume of Kent's *Commentaries*, but quite unknown to the bar of today.

If the United Nations or any other international legal structure designed to bring law and order to the world is to be successful, are not the lawyers of America *required* to know something of international law?

What Should Be Law Training of the Future?

If the "Compleat Counsellor", the well-rounded professional gentleman of the law, must be an advocate and adviser, a leader of opinion in his community, the legislative halls, and perhaps on the international scene, how shall he be trained? We lawyers speak nostalgically of Story, Kent, Cooley and Gray, of Langdell, Ames, Williston and Wigmore, of Stone, Scott and Pound, as among the great teachers of the law. So they are! But great teachers alone do not make great lawyers. If we are to develop truly great leaders of the Bar in the future, law schools must round out their curricula to teach more than private substantive law, particularly commercial and property law, which have so dominated the field of legal study in the last seventy-five years. Law deans may well ask, "What are we educating our young lawyers for? What is their objective? Tell us that and we can prescribe the courses."

Certainly in the last few decades the emphasis has been on specialization. In the so-called "law factories" the degree of specialization can become so narrow as to be ridiculed—and has been.[31] An English educator has remarked that one of the most dangerous persons we can produce is an uneducated specialist. Harold Laski has forcefully demonstrated that there are definite limitations to the abilities of "experts".[32] Justice Stone pointed out that big business has produced specialization of the Bar, so that law practice in the very large firms has become a form of mass production, and that the lawyer in such a practice has difficulty in seeing himself and his calling in proper perspective. "More and more the amount of his income is the measure of professional success."[33] For a *professional* man the intangible and more enduring rewards of his work have generally been conceded to be, not money-getting, but "professional service more consciously directed toward the advancement of the public interest".[34]

Granting that such specialization can develop highly proficient expert legalists, if it fails at the same time to inculcate a professional attitude of public service, wherein lies the claim of such a practitioner to the title of lawyer *by profession*? Perhaps no one has phrased this criticism better than the Yankee from Olympus, he who felt it was the business of a law school to teach law in the grand manner, and to make great lawyers, and that the aim of a law school should be, not to make men smart, but to make them wise in their calling:[35]

> I fear that the bar has done its full share to exalt that most hateful of American words and ideals, "smartness," as against dignity of moral feeling and profundity of knowledge. It is from within the bar, not from outside, that I have heard the new gospel that learning is out of date, and that the man for the times is no longer the thinker and the scholar, but the smart man, unencumbered with other artillery than the latest edition of the Digest and the latest revision of the Statutes.

Law Schools of Today Have New Obligations

Most practicing lawyers today would agree that the best place to study law is in a law school, not in a lawyer's office under the old apprentice system. While law schools do not graduate finished practitioners, yet they can and should provide their young

31. In *Yankee Lawyer*, the "Wall Street Law Factory" of Hotchkiss, Levy and Hogan, is described by the author this way: "There were fifteen full-fledged partners who shared a percentage in the profits and, in addition to twenty-eight juniors receiving regular salaries, there were thirty-five law clerks, forty stenographers, four cashiers, eight expert accountants, twelve office boys, a double-shift of telephone operators, a posse of process servers and detectives, a translator, a photographer, a real-estate expert, an architectural draftsman and two librarians. The plant was divided into a corporations department, a probate department, a patent department, a personal injuries and trial department, a divorce department, an international law department, and various others, while its total overhead was not far from half a million a year." *Yankee Lawyer* (New York: Charles Scribner's Sons, 1943) 142-43.

32. "We must ceaselessly remember that no body of experts is wise enough, or good enough, to be charged with the destiny of mankind. Just because they are experts, the whole of life is, for them, in constant danger of being sacrificed to a part; and they are saved from disaster only by the need of deference to the plain man's common sense." Laski, *The Limitations of the Expert* (London: The Fabian Society, 1931) 14.

33. Stone, "The Public Influence of the Bar", 48 *Harv. L. Rev.* 1 (1934), at 6.

34. *Id.* at 7.

35. Holmes, "The Use of Law Schools", *Speeches* (Boston: Little, Brown and Company, 1934) 32. He added, "But if a man is a specialist, it is most desirable that he should also be civilized; that he should have laid in the outline of the other sciences, as well as the light and shade of his own; that he should be reasonable, and see things in their proportion." *Id.* at 39.

men with a firm foundation upon which to build a well-rounded professional career. To Dean Langdell of Harvard Law School we owe the so-called "case system" of studying law. From Langdell's time up until today, private substantive law has dominated the practice, the bar examinations and the bulk of law school study.[36] That the Socratic method combined with the case system will produce legal proficiency cannot be gainsaid. *Alone,* however, it may well be questioned whether it will produce lawyers with Holmes' attributes—"dignity of moral feeling and profundity of knowledge." Just to know the law is not enough. The law schools today have a higher obligation.[37] They must develop leaders who are statesmen of the law. Whether their ultimate decision will be to keep the doctrinal approach, or to adopt the realistic, or the functional, or the sociological approach in teaching law, they must never lose sight of the ideal that law is a developing human institution designed to serve man's human needs. It is for future community leadership that law schools should be preparing law students today.

Great Lawyers Inspire Confidence in Profession

Nor must the fact ever be overlooked that great lawyers make younger men believe in great lawyers. As Holmes puts it, "he makes them incapable of mean ideals and easy self-satisfaction."[38] In his office practice the older lawyer in his decisions, his attitudes and his ethics influences the younger man perhaps more than he realizes. His standards become his protege's standards. Here, then, is a personal obligation upon every lawyer with a law clerk.

For these reasons the young man himself should use the same studious care in selecting his legal preceptor as he should in choosing his law school—and his wife! The young lawyer must make up his mind early in his professional life whether *his* ideal of the well-rounded lawyer is that of a mere conveyancer, a client caretaker, the old family solicitor, the private lawyer—or "the compleat counsellor"—for that ideal will mold and shape his practice all his days at the Bar.

Our standards of the future cannot be those of the past. We must raise our sights so far as prelegal and legal education are concerned.[39] "The perfect lawyer, like the perfect orator, must accomplish himself for his duties by familiarity with every study."[40]

Perhaps few American lawyers emulate the high standard of legal erudition of the successful British barrister. His duty is to know the law. It is an absolute rule that he must practice as an individual and not in a firm. He must be responsible alone for his own opinion; and this concept of his duty never changes. It is not at all unknown in London for a successful barrister to rise at 4:30 A.M., work at home from 5:00 until 8:00 A.M., be in court from 10:30 to 4:30, have office conferences from 4:45 until after 6:00 P.M. and return home with a briefcase full of briefs![41] Such a life makes one a master of the law, although perhaps at the price of a narrower viewpoint. To overcome this confining influence, the English barristers use their

36. Vanderbilt, *Men and Measures in the Law* (New York: Alfred A. Knopf, 1949) 55.

37. "The most difficult task of all ahead of the law schools is that of inculcating in our law students as undergraduates a sense of individual obligation, first, for the problems of the legal profession, the improvement of the administration of justice in the courts and in the administrative tribunals, the upholding of the canons of professional and judicial ethics, the elimination of unauthorized practice of the law, and the like; and secondly, for what may be called the public or social aspects of professional responsibility for guiding public opinion, for party leadership and for officeholding." *Id.* at 65.

38. Holmes, "The Use of Law Schools", *Speeches* (Boston: Little, Brown and Company, 1934) 32.

39. Perhaps nowhere is there a more masterly analysis of this problem than in the Vanderbilt "Report on Prelegal Education" presented to the American Bar Association September 13, 1944. It is partially reprinted in Vanderbilt, *Studying Law,* (New York City: Washington Square Publishing Corporation, 1945), Chapter X, 627. And see Rostow, "Liberal Education and the Law: Preparing Lawyers for Their Work in Our Society", 35 *A.B.A.J.* 626; August, 1949.

40. From Mr. Justice Story's *Miscellaneous Writings,* as quoted in Vanderbilt's "Report on Prelegal Education", 50-51, n. 50.

41. Whitney, "Inside the English Courts", 3 *The Record of the Association of the Bar of the City of New York* (December, 1948) 368, 372-74.

long summer vacations when courts are not in session for catching up on their outside reading which term-time makes impossible. In their reading they include all knowledge as their province—biography, history, philosophy, and a variety of other subjects. This undoubtedly accounts for the fact that a successful English barrister is both interesting and educated to a very high degree. How well they know that the law is a jealous mistress, to be wooed only with lonely passion! To such a lawyer the law becomes truly a seamless web, a system, not a series of water-tight compartments. Only when our law schools approximate such a method of teaching will young men be learning law in the grand manner.

What Is Professional "Success at the Bar"?

How shall the "Compleat Counsellor" be judged? What is professional success at the Bar? The law is a profession. Louis Brandeis has told us that these are three attributes of a profession:[42]

> *First.* A profession is an occupation for which the necessary preliminary training is intellectual in character, involving knowledge and to some extent learning, as distinguished from mere skill or proficiency.
> *Second.* It is an occupation which is pursued largely for others; and is not pursued merely for one's self.
> *Third.* It is an occupation in which the amount of financial reward is not the accepted measure of success.

A satisfying lifetime at the Bar, it has been said by a distinguished law teacher, usually requires four things: (1) a sound body; (2) a pleasing personality; (3) a good intellect; and (4) a character that inspires confidence. Warning us not to get brains too close to the camera, he observed:[43]

> Character has even more to do with attracting and retaining associates and clients. I know no asset that any man can have which will contribute so much to a legitimate and enduring success at the bar as the confidence of other people that he can be trusted always to do the decent thing.

The ideal of the fully accomplished lawyer is a high one,[44] not reached by every member of the Bar. The future demands that each of us try to develop, to the full extent of his individual capabilities, the persuasive eloquence of the great advocate, the sagacity of the wise attorney, the integrity of the great judge, the sense of public duty of the true statesman—or all of these. Such a man, in any age, is a respected gentleman of the law; truly—"the Compleat Counsellor."

42. Business—A Profession (Boston: Hale, Cushman & Flint, 1933) 2.

43. Warren, *Spartan Education* (Boston: Houghton Mifflin Company, 1942) 28.

44. "In order to be an accomplished lawyer, it is necessary, besides having a knowledge of the law, to be an accomplished man, graced with at least a general knowledge of history, of science, of philosophy, of the useful arts, of the modes of business, and of everything that concerns the well-being and intercourse of men in society. He ought to be a man of large understanding; he must be a man of large acquirements, and rich in general information; for, he is a priest of the law, which is the bond and support of civil society, and which extends to and regulates every relation of one man to another in that society, and every transaction that takes place in it.

"Trained in such a profession, and having these acquirements, and two things more (which can never be omitted from the category of qualifications), incorruptible integrity and a high sense of honor, the true lawyer cannot but be the highest style of a man, fit for any position of trust, public or private; one to whom the community can look up as a leader and guide; fit to judge and to rule in the highest places of magistracy and government; an honor to himself, an honor to his kind." From "Law, Its Nature and Office as the Bond and Basis of Civil Society", Introductory Lecture to the Law Department of the University of Pennsylvania, October 1, 1884, by Joseph P. Bradley, Justice of the Supreme Court, as quoted in *Case and Comment* (July-August, 1948) 48.

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